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No. 567

Supreme Court of the United States

OCTOBER TERM, 1954

STATE OF MONTANA, EX REL. FORD JOHNSON,
Petitioner,

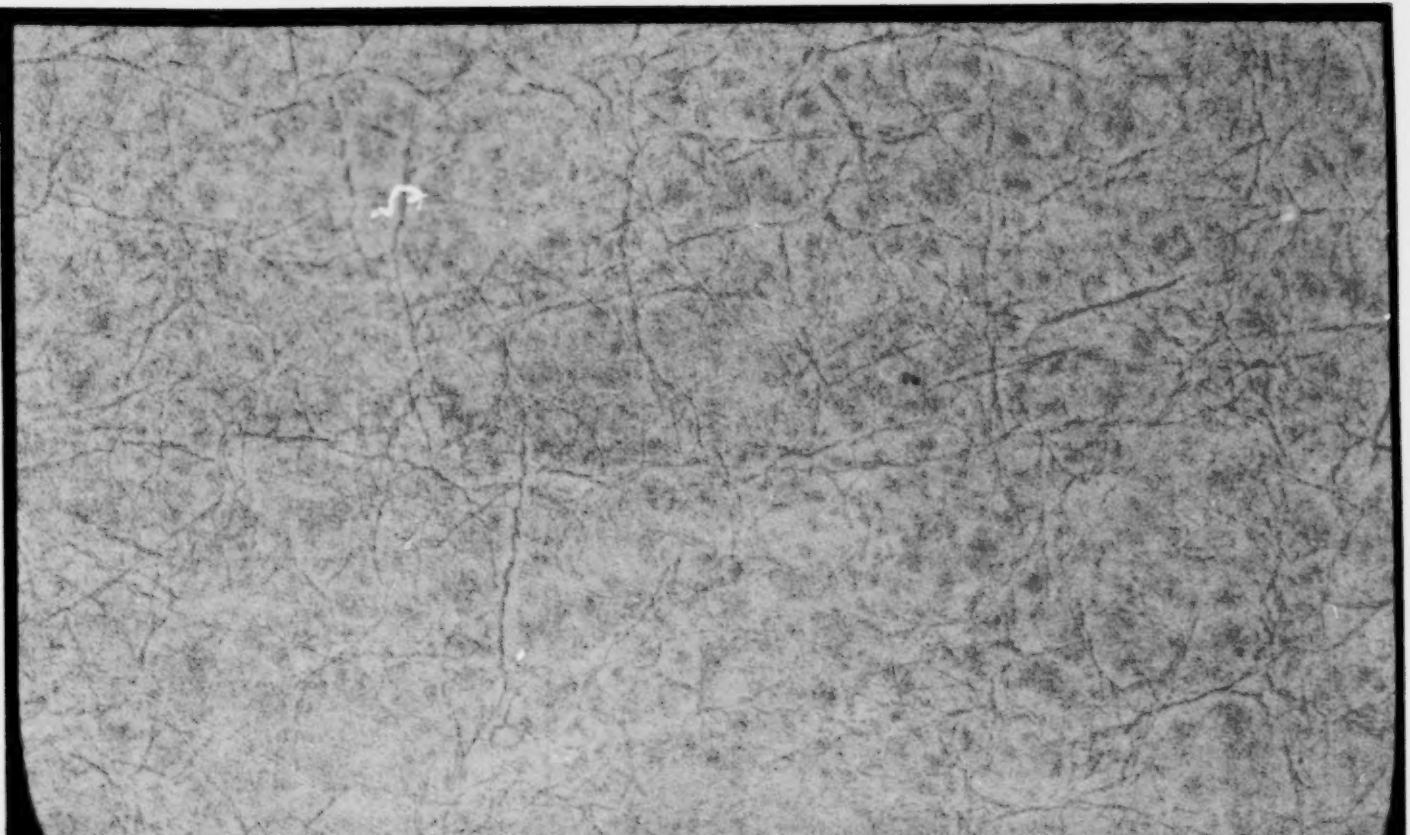
v.

THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, AS GOVERNING BOARD OF THE DEPARTMENT OF STATE LANDS AND INVESTMENTS; J. HUGO ARONSON, GOVERNOR OF THE STATE OF MONTANA, PRESIDENT OF SAID BOARD; MARY M. CONDON, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF MONTANA; SAM W. MITCHELL, SECRETARY OF STATE OF THE STATE OF MONTANA; ARNOLD H. OLSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA, AS MEMBERS OF SAID BOARD; AND LOU W. BRETZKE, COMMISSIONER OF STATE LANDS AND INVESTMENTS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

WILLIAM J. JAMESON,
Billings, Montana,
RALPH J. ANDERSON,
Helena, Montana,
DEAN ACHESON,
CHARLES A. HORSKY,
W. GRAHAM CLAYTOR, JR.,
701 Union Trust Bldg.,
Washington, D. C.,
Attorneys for Petitioner.

Of Counsel:
COVINGTON & BURLING,
Washington, D. C.
COLEMAN, JAMESON & LAMEY,
Billings, Montana.



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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Montana entered in the above cause on December 10, 1954 (Appendix, p. 27), reversing a judgment of the District Court of the First Judicial District of the State of Montana in

and for the County of Lewis and Clark (Appendix, pp. 28-31), and ordering a final judgment entered for Respondents.

OPINIONS BELOW

The State District Court prepared no separate opinion but in its judgment it included certain conclusions of law and stated that the proceeding involved no determination of any issues of fact (Appendix, pp. 28-31). The several opinions in the Supreme Court of Montana (Appendix, pp. 1-26) are not yet reported.

JURISDICTION

The judgment of the Supreme Court of Montana was entered on December 10, 1954 (Appendix, p. 27). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3), the court below having held a statute of the State of Montana invalid as in conflict with an Act of Congress.

QUESTION PRESENTED

Congress in 1948 amended Section 11 of the basic Enabling Act under which the States of Montana, North Dakota, South Dakota and Washington were admitted to the Union. 62 Stat. 170. As amended, the section now permits the execution of oil and gas leases on lands granted by the United States to these States for the support of their schools "for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective States." The purpose of the legislation, as explained by the House Committee, was to permit these states "to make leases for the life of the well on oil-bearing property rather than for a limited period of time, as is required by the present law". H. Rep. No. 1374, 80th Cong., 2d Sess. (1948), p. 1. After due acceptance of this amendment by legislative enactment (Mont. Laws 1949, c. 18, Mont. Rev. Codes 1947, Supp. 1953, § 83-502), Montana

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amended its own laws to provide that all oil and gas leases on school lands "shall be granted for a primary term or period of ten (10) years, and as long thereafter as oil or gas in paying quantities shall be produced thereunder". Mont. Laws 1953, c. 122, § 1, Mont. Rev. Codes 1947, Supp. 1953, § 81-1702.

The question presented is whether Section 11 of the Enabling Act, as amended, invalidates this Montana statute because, as the court below held (Appendix, p. 4) the requirement of the Montana statute that the lease continue beyond its primary term "as long thereafter as oil or gas in paying quantities shall be produced thereunder" is "in direct conflict with section 11 of the Enabling Act, and contrary to its specific direction that such lease 'shall be for such term of years' as provided by the legislature".

STATUTES INVOLVED

Section 11 of the basic Enabling Act of February 22, 1889, 25 Stat. 676, as amended most recently by the Act of April 13, 1948, c. 183, 62 Stat. 170, provides:

> "That all lands granted by this Act shall be disposed of only at public sale after advertising . . . .
>
> "Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective States; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years."

Montana Laws 1953, c. 122 § 1 (Mont. Rev. Codes 1
Supp. 1953, § 81-1702), provides in part:

> "All leases issued hereunder shall be granted f
> primary term or period of ten (10) years, and as
> thereafter as oil or gas in paying quantities shal
> produced thereunder; provided, however, that all d
> ing, rental and other obligations are fully kept and
> formed by the lessee; . . . "

STATEMENT

Petitioner, on May 4, 1953, was granted leave to file
complaint in intervention and to intervene (R. 30)
pending action for injunctive relief in the nature of m
damus brought upon the relation of one Willis B. Jo
against the State Board of Land Commissioners of the S
of Montana, the individual members of that Board (inc
ing the Governor), and the Commissioner of State La
and Investments. Demurrers to the application of Jo
and to petitioner's complaint in intervention (R. 44, 46)
overruled by the trial court (R. 69). Respondents ele
not to plead further (R. 71), and final judgment was ent
(R. 73-74).

The facts, as established by the application and compl
in intervention, are as follows:

Petitioner, Ford Johnson, is a resident of Helena, L
and Clark County, Montana, and a taxpayer on prop
for the support of the Montana public schools (R. 17).
lis B. Jones, the relator, who has not joined in this petit
is also a taxpayer on property in Montana (R. 5).
action was brought on behalf of all other Montana taxpa
who desired to join (R. 5).

The respondent State Board of Land Commissioner
the State of Montana is the State agency charged with

duty of directing, controlling, leasing and selling the school lands, under regulations and restrictions prescribed by law (R. 1, 17). The individual respondents are the members of the Board, except Bretzke, the Commissioner of State Lands and Investments (R. 1-2, 17).

In February 1953 the Montana legislature, by an amendment to Section 81-1702, Revised Codes of Montana (Mont. Laws 1953, c. 122), directed the State Board of Land Commissioners that thereafter—

> "(2) All leases issued hereunder shall be granted for a primary term or period of ten (10) years, and as long thereafter as oil or gas in paying quantities shall be produced thereunder; . . ."

On March 31, 1953, respondent Olsen, as Attorney General of Montana, issued an opinion (Op. No. 13, Vol. 25) that this amendment of the Montana leasing law was invalid because in conflict with the provisions of Section 11 of the Enabling Act, as amended by Congress in 1948 (R. 3, 18).[1] The Board of Land Commissioners, in accordance with the opinion, determined to disregard this Montana statute and to call for bids to be made for oil and gas leases on school lands in accordance with the State law in effect prior to the 1953 amendment (R. 4, 18). The complaint specifically points out that the action of the Board raised the Federal question here involved: whether Chapter 122, Laws of Montana 1953, "contravenes and violates the Enabling Act of the State of Montana (25 Stat. 676) as amended by said Public Law 480 [Act of April 13, 1948, 62 Stat. 170]" (R. 18).

Petitioner, as a taxpayer, will be irreparably damaged and the public schools of Montana will suffer substantial losses if oil and gas leases on school lands are not made in

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[1] Act of April 13, 1948, c. 183, 62 Stat. 170, *supra*, p. 3.

accordance with the mandate of the 1953 statute (R. 21). First year rentals on oil and gas leases on school lands are, under the law of Montana, "distributed to the several school districts of the State", the failure to call for bids on such leases in accordance with the 1953 statute "will result in a reduction of the amount of money that will be bid as first year rental for said leases" by the oil industry, and this "will reduce the amount of money that will be available for distribution to the school districts" (R. 4-5). As a result "the public schools of the State of Montana will lose great sums of money", and petitioner, as a taxpayer on property for the support of the schools, will be irreparably damaged (R. 17, 21).[2] Accordingly, an order was requested enjoining respondents from entering into any oil or gas leases of school lands on any terms other than those established by the 1953 amendment (R. 6, 21-22).

A temporary restraining order was issued on April 28, 1953 (R. 10). After a hearing, the demurrers filed by the respondent Board of Land Commissioners to the application and the complaint in intervention (R. 44, 46) were overruled, with leave to plead further (R. 69). The Board having elected to stand on its demurrers (R. 71), final judgment was entered granting the injunction as prayed (R. 73-74). The court's order noted that all material allegations had been admitted by the pleadings, and concluded that the 1953 amendment to the Montana leasing act did not violate the provisions of the Federal Enabling Act or of the State constitution.

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[2] Under Montana law, the legislature is required to supplement the funds derived from the school lands by a property tax sufficient to complete the school budget as determined according to statutory procedures, and the county commissioners of each county are likewise required to levy a property tax sufficient when added to the funds received from the State to complete the county school budget. See Mont. Rev. Codes 1947, Secs. 84-3810, 75-1704, 75-1722, 75-1723, 75-3610, 75-3706, 75-4508, and 75-4516.

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On appeal to the Supreme Court of Montana, the appellants having assigned error, *inter alia*, to the ruling of the trial court that the Montana law did not violate the Enabling Act (Appendix, p. 32), this judgment was reversed (Appendix, p. 27). The majority opinion of Justice Freebourn, concurred in by Chief Justice Adair and Justice Bottomly (Appendix, p. 15), held as its sole ground of decision that the 1953 amendment to the State leasing law was invalid because not consistent with the Federal Enabling Act, as amended in 1948 (Appendix, p. 4):

> "Oil and gas leases issued under section 81-1702, as attempted to be amended by Chapter 122, are contrary to and in direct conflict with section 11 of the Enabling Act, and contrary to its specific direction that such lease 'shall be for such term of years' as provided by the legislature."

Justice Bottomly, in a separate opinion (Appendix, pp. 5-11), added as an additional ground of decision (in which none of the other members of the court concurred) that Section 11 of the Enabling Act had never been validly amended so far as Montana was concerned. In his view, it could be effectively changed for Montana only by popular referendum in the State on whether the Congressional changes should be accepted.

Justice Angstman, dissenting, concluded that the 1953 Montana oil and gas leasing act was consistent with the Enabling Act and valid under State law (Appendix, pp. 18-26). The fifth member of the court, Justice Anderson, filed a separate opinion (Appendix, pp. 11-18) in which he agreed with Justice Angstman that the Montana act was not in conflict with the Enabling Act, and that the Enabling Act had been properly accepted by the legislature. He further argued, however, in dissenting from the reasoning of and result reached by the majority, that neither the

1953 leasing act nor the earlier leasing acts were valid under State law as interpreted by an earlier decision of the Montana Supreme Court, from which he had dissented and with which he still vigorously disagreed.

The decision below thus necessarily rests upon the determination of a Federal question by the majority of the court—the proper interpretation of the 1948 amendment to the Federal Enabling Act. This was the sole ground of decision of two of the justices, and was concurred in by a third. At most, only two of the five justices below can be said to have been of the opinion that the action of the Board of Land Commissioners in disregarding the 1953 leasing act could be sustained on any non-Federal ground, and those two disagreed with each other (and with the rest of the court) about this. The federal question is thus properly presented for consideration by this Court.

REASONS FOR GRANTING THE WRIT

Congress has authorized North and South Dakota, Montana and Washington to make oil and gas leases on school lands "for such term of years and on such conditions" as the State legislatures may prescribe. The Supreme Court of Montana has now held that this language forbids the Montana legislature from requiring oil and gas leases to be "for a primary term or period of ten (10) years, and as long thereafter as oil or gas in paying quantities shall be produced thereunder", and it has declared invalid the statute which did so. The "as long thereafter" clause, the court said, is contrary to the "specific direction" in Section 11 that leases shall be for a "term of years", since the clause would be for "an uncertain period of time, dependent upon the life of the particular oil or gas well produced on any given lease" (Appendix, p. 4).

In holding the 1953 Montana law invalid, the Montana court has decided a federal question of substance, not

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heretofore decided by this Court. In reaching this decision it has seriously misinterpreted an act of Congress, with the result that the act has become wholly ineffective to accomplish its intended purpose in Montana, and has become of doubtful effectiveness in the other three states to which it is applicable—North Dakota, South Dakota and Washington.

I

There can be no real doubt that when Congress amended Section 11 in 1948 it intended to authorize precisely the kind of oil and gas leases prescribed by the 1953 Montana law. Montana had requested this authority and Congress believed that by enacting the 1948 amendment to Section 11 it was complying with the request. The decision below makes no reference to the overwhelming proof of what Congress intended to do, and derives from what Congress said a wholly unreal and artificial limitation on the authority granted to four important States to make oil and gas leases of school lands.

The 1948 amendment to Section 11 must be understood in the framework of the Enabling Act itself. That act was passed on February 22, 1889, to provide for the admission to the Union of North Dakota, South Dakota, Montana and Washington. C. 180, 25 Stat. 676. Section 10 granted to each of these States two sections in every township for the support of the States' common schools; other sections of the act made various land grants for colleges and universities.

As originally enacted, Section 11 dealt with the disposition or lease by the four States of these educational lands, and limited leases to a maximum of five years. Since Section 18 excluded known mineral lands from the educational grants, the limitation on leases obviously was intended to apply to agricultural leases and not to mineral leases. See *Neel* v. *Barker*, 27 N.M. 605, 204 P. 205 (1922). After the

grants had been made to the States, it was found that some of the lands were mineral in character. By Act of August 11, 1921 (c. 61, 42 Stat. 158), Congress amended Section 11 by adding a provision that "any of such granted lands found, after title thereto has vested in the State, to be mineral in character, may be leased for a period no longer than twenty years".

Section 11 was again amended in 1932 (Act of May 7, 1932, c. 172, 44 Stat. 150), and again in 1938 (Act of June 25, 1938, c. 700, 52 Stat. 1198) and prior to its amendment in 1948 it contained the following leasing limitations:

> "The said lands may be leased under such regulations as the legislature may prescribe; but leases for grazing and agricultural purposes shall not be for a term longer than ten years; mineral leases, including leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty years; and leases for development of hydroelectric power for a term not longer than fifty years."

Montana in its turn liberalized its own school land leasing laws. At the time of the 1948 amendment by Congress, and until amended by the Montana legislature in 1953, Montana law provided (Mont. Rev. Codes 1947, Section 81-1702):

> "(2) all leases issued hereunder shall be granted for a period not exceeding ten (10) years and as long thereafter during the term of twenty (20) years commencing with the date of such lease or leases, as oil or gas of commercial quality and in commercial quantity shall be produced from the land covered thereby; . . ."

Here we see the introduction of the "as long thereafter" clause, although in accordance with the then existing Sec-

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tion 11 of the Enabling Act it was limited by the twenty years restriction. But the limitation of school land leases to a maximum term of 20 years worked a hardship on the State revenue. On March 3, 1947, the Montana legislature transmitted a Memorial to Congress requesting a further liberalization of Section 11. See 93 Cong. Rec. 2426. The Memorial, after stating that the 20-year limitation—

> "has resulted in failure of the State lands to be developed for the production of oil, gas, and other hydrocarbons on an equal footing with public and privately owned lands similarly situated",

requested Congress to authorize Montana—

> "to lease her State lands for the production of oil, gas, and other hydrocarbons for such periods of time and on such terms and conditions as may be, from time to time, provided by the Legislative Assembly of the State of Montana."

There can be no doubt that the court below was correct in stating that the 1948 amendment by Congress was pursuant to this Memorial. Appendix, p. 3. After copies of the Memorial were transmitted to Congress, a Montana Representative introduced the bill (H.R. 4167, 80th Cong.) which became the 1948 amendment.[3] As introduced, it applied only to Montana; when it was reported out favorably to the House, however, it was amended to be applicable to all four States.

Nor can there be doubt that Congress intended to accede to the Montana request. The report is specific and categorical that the bill was intended to authorize oil and gas

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[3] An identical bill, S. 1604, was introduced by a Montana Senator.

leases with the "as long thereafter" clause as contained in the 1953 Montana statute, and to be no longer limited, as it had been, by the twenty year restriction. Page 1 of the House report states (H. Rep. No. 1374, 80th Cong., 2d Sess.):

> "The purpose of this bill, as amended, is to amend the enabling act of the States of North Dakota, South Dakota, Montana, and Washington, whereby these states will be permitted to make leases for the life of the well on oil-bearing property rather than for a limited period of time, as is required by the present law."

A letter from the Department of the Interior to the House Committee, which is reprinted in the report (pp. 2-3), indicates why Congress was favorably inclined toward the requested amendment, and adds, if that be needed, further evidence of the intention of Congress to approve leases with an "as long thereafter" clause. The letter points out that in 1921, when the lease term in Section 11 was fixed at 20 years, that period was in conformity with the Federal Mineral Leasing Act (Act of February 25, 1920, c. 85, 41 Stat. 437), but that in 1935 "Congress amended section 17 of the Mineral Leasing Act to provide that oil and gas leases on the public lands shall be for a definite term with a 'thereafter' clause".[4] The letter continued:

> "The general practice as to public lands at present is to issue oil and gas leases for a definite term and so long thereafter as oil and gas are produced. I know

[4] The relevant provision of the 1935 amendment to which the letter refers (Act of August 21, 1935, c. 599, 49 Stat. 674, 677) is as follows:

> "Leases hereafter issued under this section shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities when the lands to be leased are within any known geological structure of a producing oil or gas field. . . ."

The existing law is essentially unchanged. U.S.C. Title 30, Sec. 226.

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> of no reason which would militate against extending authority to the State to do likewise with respect to the school lands."

The Senate Committee on Interior and Insular Affairs likewise reported the bill favorably; its brief report contained an identical letter from the Department of the Interior. S. Rep. No. 1014, 80th Cong., 2d Sess.

If further evidence be needed of the purpose and intention of Congress to authorize "as long thereafter" clauses by the 1948 amendment to Section 11, it is available in the history of the amendments made the following year to the Enabling Acts for the adjacent States of Idaho and Wyoming. The legislature of Idaho, like that of Montana, memorialized Congress for a liberalization of the similar restrictions imposed by the Idaho Enabling Act on oil and gas leases of school lands. In response, on October 16, 1949, Congress authorized leases "for periods not more than ten years, and in the case of an oil, gas, or other hydrocarbon lease, for as long thereafter as such product is produced". C. 622, 63 Stat. 714. Both the Senate and House reports on the Idaho amendments stated that "Similar amendments have been made to the enabling act of other Western States, such as Montana and Washington." H. Rep. No. 828, p. 2, S. Rep. No. 875, p. 2, 81st Cong., 1st Sess. (1949).

With respect to Wyoming, a similar relaxation of the Enabling Act limitations on leases of school lands (Act of October 15, 1949, c. 599, 63 Stat. 703) was described by the House Committee as follows (H. Rep. No. 850, 81st Cong., 1st Sess., p. 1):

> "The bill would permit the State to issue mineral leases on school land granted to the State under the enabling act beyond the present 10-year limitation for so long thereafter as mineral production continues. . . . A similar amendment has been made to the re-

spective enabling acts of Montana and Washington and is proposed for the State of Idaho."

We submit that, taken as a whole, there could scarcely be more conclusive evidence that Congress intended to authorize the Montana legislature to enact just such a law as that which the court below has held unauthorized, and hence invalid. Can it be said, however, that Congress was so very inept in its choice of words to express its intent that it has thwarted its own purpose? We think clearly not.

Congress, in the 1948 amendment to Section 11, eliminated the words "for a term not longer than twenty (20) years", and substituted the clause "shall be for such term of years and on such conditions as may be from time to time provided by the legislatures." When it is recalled that since 1935 the comparable provisions of the Federal Mineral Leasing Act (applicable to Federally owned lands) had provided for oil and gas leases for a fixed primary term, followed by an "as long thereafter" clause, and that such language in leases was the general pattern as to oil and gas leases on public lands (see H. Rep. No. 1374, quoted *supra*, pp. 12-13),[5] the language of the amendment is readily understandable. Congress was not attempting to fix, as it might have, the primary term of the lease, which would measure its duration in the event no oil or gas were produced; that could be for such term of years as the State legislatures might determine. Nor was Congress specifying, as it might, the nature of the "as long thereafter" clause, or any other conditions which the legislature might wish to prescribe. What the Montana legislature did, in its 1953 amendment to the State leasing law, was precisely what

[5] See also Act of May 29, 1924, c. 210, 43 Stat. 244, U.S.C. Title 25, Sec. 398, for comparable provisions with respect to unallotted Indian lands. A detailed discussion of the history and widespread commercial use of the "as long thereafter" clauses in oil and gas leases is contained in Summers, The Law of Oil and Gas (Perm. Ed. 1954) Secs. 153, 282-292.

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Congress intended and authorized: it prescribed a primary term of ten years, and, as a condition precedent to the continuation of the lease after the primary term, "as long thereafter as oil or gas in paying quantities shall be produced thereunder".

The court below did not seek to give effect to the entire clause added to Section 11 by the 1948 amendment; it spoke only of the phrase "term of years." Even were that the entire amendment, however, the Montana law would be authorized. There is nothing in the phrase "term of years" which demands that the number of years be fixed and be known in advance. It has been held, for example, that a life sentence may properly be imposed under a statute permitting punishment "for such term of years" as the court may fix. *Bailey* v. *United States*, 74 F. 2d 451 (10th Cir. 1934). Oil and gas leases with an "as long thereafter" clause do have a definite terminus: ". . . the common experience of men has been that oil wells, and the territory in which they are sunk, become exhausted in time." *United States* v. *Ludey*, 274 U.S. 295, 303. By use of this expression Congress obviously did not intend to mean anything different than "period of years" or "length of time" or "period of time" or any of many similar expressions which might have been used to give discretionary power.

Furthermore, Congress plainly did not intend by use of the phrase "for such term of years" to impose a limitation on the States measured by any technical concept of local real estate or mineral law; to do so would only have introduced vast uncertainty and confusion into this basic statute.[6] It would be absurd to conclude, for

[6] Whether an oil or gas lease with or without an "as long thereafter" clause is classified under local law as personal property, a determinable fee, an interest in the nature of a profit à prendre, or something else is a question on which the laws of the different States and even the courts within a single State are generally unclear. As one of the leading authorities in this field notes, the cases "demonstrate the utter futility of at-

example, that when Congress amended Section 11 it intended to apply one limitation to States like Montana whose mineral law recognizes ownership of oil and gas in place, *Rist* v. *Toole County*, 117 Mont. 426, 159 P. 2d 340 (1945), and another to States like Washington which apparently recognize no such ownership until the oil or gas is reduced to possession. *Walla Walla Oil, Gas and Pipe Line Co.* v. *Vallentine*, 103 Wash. 359, 174 P. 980 (1918).

But were the language of Congress construed in the context of the conveyancer's technical vocabulary, it still would not mean, as the Montana court believed, that leases must be made for a fixed and definite number of years. For Section 11 says "for such term of years and upon such conditions" as the legislature may prescribe. Now a "condition", if one wishes to be technical, is a word of art, broad and comprehensive. An "estate upon condition" was hoary with age when Blackstone wrote, "being such," so he put it, "whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated." Blackstone, *Commentaries on the Laws of England*, Cooley's Ed., Chicago, 1884, Vol. I, Book II, Chap. 10, p. 152. And it is true today, as then, that "the office of a condition is, generally, to indicate the terms upon which a certain right will arise, or continue, or be defeated." *De-Grasse* v. *Verona Mining Co.*, 185 Mich. 514, 526-27, 152 N.W. 242, 246 (1915); see also *Joyce* v. *Krupp*, 83 Cal. App. 391, 397, 257 P. 124, 127 (1927). Definitions indicating the variety and scope of its meanings could be multiplied; but to no purpose, since Congress imposed no limit on the conditions available. They can be such "as may be from time to time provided by the legislatures of the respective States." So, plainly, the legislature may by condition in the lease

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tempting to classify the oil and gas lessee's interest on the basis of common-law interests in land." Summers, The Law of Oil and Gas (Perm. Ed. 1954) § 153.

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enlarge the term of years upon the happening of an uncertain event for an uncertain period. And it may by another condition terminate the lease upon the happening of an uncertain event at an uncertain time.

But Congress, we submit, was using legislative words with much less involved and complicated meanings in mind. The legislative history outlined above makes it apparent that the phrase "for such term of years" was not used in any technical sense. Indeed, even were the literal meaning of the phrase far more restrictive than it is, "the policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes." *Markham* v. *Cabell*, 326 U. S. 404, 409, quoted in *Cox* v. *Roth*, No. 40, October Term, 1954, decided January 10, 1955.

II

This Court has commented on a general intention of Congress, now more than a half century old, that school grants should have " 'equal operation and equal benefit in all the public land states and territories' ". *United States* v. *Wyoming*, 331 U.S. 440, 453.[7] *A fortiori*, Section 11 should have equal application in each of the four States to which it is applicable—North and South Dakota and Washington, as well as Montana. Under the decision below, however, Montana has been deprived of the benefits of the liberalization of oil and gas leasing terms intended to be extended by Congress, whereas in North Dakota, the State Supreme Court has interpreted the same Federal statutory provision so as to reach precisely the opposite result. *State ex rel. Rausch* v. *Amerada Petroleum Corp.*, 78 N.D. 247, 49 N.W. 2d 14 (1951). This North Dakota decision is thus in square conflict with that of the court below.

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[7] In accordance with this policy, Congress has also liberalized the provisions corresponding to Section 11 which are applicable to Idaho and Wyoming. See pp. 13-14, *supra*.

The action in the *Rausch* case challenged the validity, under Section 11 of the Enabling Act and various provisions of the State constitution, of the North Dakota statute which authorized a lease substantially identical with that required by the 1953 Montana statute. As described by the North Dakota court (78 N. D. at p. 251, 49 N. W. 2d at p. 17), the challenged lease

> "gives to the lessee the right to explore and exploit the oil and gas resources underlying the land described therein for a term of five years, and as long thereafter as oil or gas or either of them is produced from the land by the lessee."

The power of the State under the 1948 amendment to Section 11 of the Enabling Act to make such a lease was sustained by a unanimous court. After quoting the provisions of this amendment, the court said (78 N. D. at p. 255, 49 N. W. 2d at p. 19):

> "Congress has removed all doubt as to the right of a state to enter into leases for the production of minerals, including leases for the exploration for oil and gas, by amending the Enabling Act. The legislature of North Dakota, insofar as the Enabling Act and its amendments are concerned, had full power to provide for the execution of oil and gas leases."

Only a review by this Court can prevent a situation in which Section 11 will have one interpretation in Montana, and a directly opposite interpretation in North Dakota. The effect of leaving this conflict unresolved, however, is more serious than merely a resulting lack of uniformity; as a practical matter it makes it impossible for prospective lessees in either of these States to be sure just what form

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of leases can be validly executed. If the interpretation of the court below is right, North Dakota leases which contain "as long thereafter" clauses are of doubtful validity, and present and prospective lessees are on notice that they may be held invalid in future litigation in the State or Federal courts; on the other hand, if the interpretation of the Supreme Court of North Dakota is right, the leases now to be offered by respondents in Montana in disregard of the mandatory provisions of that State's 1953 leasing law may similarly be held to be invalid in future litigation. The effect of the 1948 amendment to Section 11 in the other two States to which it is applicable, South Dakota and Washington, is of necessity in confusion and doubt. Review by this Court is warranted to eliminate the conflict, to resolve the doubt and confusion which now exist, and to effectuate the policy of uniform applicability of federally imposed restrictions on school lands in the several States.

III

The importance of the question as to the proper interpretation of Section 11 is apparent from what has already been said. The Montana legislature, with the approval of the Governor, regarded the matter as of sufficient importance to memorialize Congress (93 Cong. Rec. 2426), and to enact a new leasing law for the State when, as it believed, the prayer of its memorial had been granted. Laws 1953, c. 122. More than a decade earlier, Congress itself had changed the lease provisions in the Federal Mineral Leasing Act of August 21, 1935, c. 599, 49 Stat. 674. The late Secretary Ickes pointed out to the Congress at that time that "on private lands it is customary to grant leases for a definite period of time and so long thereafter as oil or gas is produced in paying quantities", and that "it seems

only reasonable that the term of the lease should be for the productive life of the wells thereon, thus avoiding the necessity of producing all oil possible within a prescribed term regardless of conditions in the industry." See H. Rep. 1747, 74th Cong., 1st Sess., p. 4 (1935). The commercial and conservation advantages of the lease with the fixed primary term and the "as long thereafter" clause and the resultant increased return to the State as lessor, cannot fairly be gainsaid.

Nor can one doubt the major impact of the decision below. School lands held in trust by Montana under Federal grant have totalled almost 6 million acres of which over 5 million acres are still unsold. These lands have produced over $100 million for Montana schools. Since 1920 oil and gas leases have produced almost $14 million for school purposes. Until the present controversy substantially suspended leasing in 1953, oil and gas royalties and rentals on oil and gas leases constituted a substantial portion of the total receipts from these lands; in the fiscal year 1952 they made up some two-thirds of the total yield of the lands of almost $9 million. See *Biennial Report of Commissioner of Lands and Investments* (Helena, Montana 1954), pp. 9, 17, 24, 33. New oil and gas discoveries in Montana are still continuing, particularly in the field known as the Williston Basin area, which has been one of the major new oil fields of the past decade.

Whether future revenues from oil and gas leases on school lands may be made in the advantageous form which Congress intended to authorize or must continue to be made in terms disadvantageous to the State, is a question which will be of major importance in determining the value of these lands to the support of the schools for which they were intended.

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CONCLUSION

The pendency since April 1953 of the challenge to the 1953 amendment to the oil and gas leasing provisions of the Montana statute, instituted by the legal opinion of the Attorney General of the State, has effectively prevented leasing for oil and gas of public school lands in Montana by the respondent Board of Land Commissioners. From the date of filing of this action until the decision below, the Board was enjoined from proceeding under the former law and precluded by its acceptance of the Attorney General's opinion from proceeding under the 1953 amendment. Since the decision below, although the injunction has been dissolved, few will seek, and no one will bid very much, for a lease issued under the former Montana law while this question remains unsettled by this Court. Any such lease is plainly invalid under the mandatory provisions of the 1953 amendment if that amendment is now the law of Montana, as it is if it is within the authority granted by Congress.

The issue, we believe, is clear: did Congress give adequate expression of its intent to permit oil and gas leases with a fixed primary term and an "as long thereafter" clause? The answer, we believe, is equally clear: Congress used words completely adequate to authorize the leases which Montana, by its 1953 law, has required. We respectfully submit that in view of the importance and simplicity of the only question presented, the lack of any doubt as to the purpose and intent of Congress and the urgency of an early decision in order to avoid unnecesary continuation of irreparable loss to the school revenues of the State of Montana, the petition for a writ of certiorari should be granted, and the judgment of the Supreme Court of Montana should forthwith be reversed, with instructions for such further proceedings as may be necessary, consistent with the in-

terpretation of Section 11 of the Enabling Act enunciated in the judgment of the State District Court (Appendix, p. 30). If, however, this petition should be granted but the Court should determine that oral argument is required, it is requested that the cause be placed on the summary docket and advanced for argument during the present term, and that in the interest of the earliest possible hearing this petition be accepted under Rule 40 as the brief of petitioner on the merits.*

Respectfully submitted,

WILLIAM J. JAMESON,
Billings, Montana.
RALPH J. ANDERSON,
Helena, Montana.
DEAN ACHESON,
CHARLES A. HORSKY,
W. GRAHAM CLAYTOR, JR.,
Washington, D. C.,
Attorneys for Petitioner.

Of Counsel:
COVINGTON & BURLING,
Washington, D. C.
COLEMAN, JAMESON & LAMEY,
Billings, Montana.

January 1955.

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* The Clerk of this Court has informed us that he believes the relatively brief record in this case could be printed within approximately fifteen days after the entry of an order granting certiorari. Under these circumstances, respondents would have access to these printed copies of the record well in advance of the expiration of the thirty days following such order within which to file their briefs on the merits under Rule 41(2).

APPENDIX

APPENDIX A

OPINIONS BELOW

No. 9340

STATE OF MONTANA

In the Supreme Court, December Term, 1954.

STATE OF MONTANA, EX REL., WILLIS B. JONES,
RELATOR AND RESPONDENT

v.

STATE BOARD OF LAND COMMISSIONERS, ET AL.,
DEFENDANTS AND APPELLANTS

STATE OF MONTANA, EX REL., FORD JOHNSON,
RELATOR AND PLAINTIFF IN INTERVENTION AND RESPONDENT

v.

STATE BOARD OF LAND COMMISSIONERS, ET AL., SUPRA,
DEFENDANTS AND APPELLANTS

Submitted: January 22, 1954.
Decided: Dec. 10, 1954.
Filed: Dec. 10, 1954. Frank Murray, Clerk.

Mr. Justice Freebourn delivered the Opinion of the Court.

Willis B. Jones, relator and respondent, brought this action in the district court of Lewis and Clark County, seeking a writ to prevent the Montana state board of land commissioners and its individual members, defendants and respondents, "from conducting any sale or receiving any bids upon any lease for oil and gas upon any school trust lands upon any terms other than those prescribed and established by the legislature of the State of Montana in Chapter 122, Montana Session Laws, 1953."

Ford Johnson, relator and respondent, filed a complaint in intervention, asking the same relief as Jones, and praying that the state board of land commissioner be restrained "from issuing oil and gas leases on such public school lands in accordance with and pursuant to the provisions of section 81-1702, Revised Codes of Montana 1947, as that section stood prior to its amendment by said section 1, Chapter 122, Laws of Montana 1953."

Demurrers of the land board to the complaint and complaint in intervention were, by the district court, overruled, and counsel for the land board elected to stand upon such demurrers and elected "to file no further pleading in said cause and said defendants waive time to further plead in said cause."

The district court thereupon, on July 31, 1953, entered its judgment whereby the land board was "permanently enjoined and restrained from conducting any sale or receiving any bids upon any lease for the production of oil and gas upon any school trust lands of the State of Montana granted to it by the Enabling Act (25 Stat. 676) upon any terms other than those prescribed and established by section 1 of Chapter 122 of the Laws of Montana of 1953."

The defendant land board appealed from such judgment.

Prior to 1921, when Congress assumed to amend the Enabling Act (42 Stat. 158), state lands could be leased "for periods of not more than five years." (Sec. 11.)

The legislature of this state by the enactment of Chapter 108, Laws of 1927, and assuming to act pursuant to the above 1921 amendment of Congress, undertook to extend such period of leasing to not more than 20 years. See Texas Pacific Coal & Oil Co. v. State, 125 Mont. 258, 234 P. 2d 452.

The Enabling Act, section 11, prior to 1948, provided that leases for the extraction of oil and gas on state lands should be for a specified term of years.

Such section, in part, provided that:

"*The said lands may be leased under such regulations as the legislature may prescribe;* but leases for grazing and agricultural purposes shall not be for a term longer than ten (10) years; mineral leases, including *leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty (20) years*; and leases for development of hydroelectric power for a term not longer than fifty (50) years." Emphasis supplied.

In 1948, the Congress of the United States assumed to amend section 11 of the Enabling Act (Public Law 480—80th Congress, Ch. 183, 62 Stat. 170), pursuant to a joint memorial of the 1947 Montana legislature, so as to provide:

"Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including *leases* for exploration *for oil, gas,* and other hydrocarbons *and the extraction thereof, shall be for such term of years* and on such conditions as may be from time to time provided by the legislatures of the respective states; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years." (Public Law 480—80th Congress, Ch. 183, 62 Stat. 170.)

The 1949 Montana legislature, by Chapter 18, Laws of 1949, p. 29, assumed to accept the above amendment by the Congress.

The 1953 Montana legislature then undertook to amend R.C. M 1947, Sec. 81-1702, by the enactment of Chapter 122, Laws of 1953, p. 220, in conformity with the above attempted congressional amendment.

Prior to such amendment by Chapter 122, section 81-1702 provided:

"(2) All leases issued hereunder shall be granted for a period not exceeding ten (10) years and *as long thereafter during the term of twenty (20) years* commencing with the date of such lease or leases * * * "

After the enactment of Chapter 122, section 81-1702, as amended, read:

"(2) All leases issued hereunder shall be granted for a primary term or period of ten (10) years, and *as long thereafter as oil or gas in paying quantities shall be produced thereunder* * * * "

It can be seen from a reading of Section 81-1702, as it was before and after the purported amendment by Chapter 122, that the life of an oil and gas lease of "twenty (20) years," a definite and specified "term of years," became, under the purported amendment, "as long thereafter as oil or gas in paying quantities shall be produced," which was not a "term of years," but an uncertain period of time, dependent upon the life of the particular oil or gas well produced on any given lease.

Oil and gas leases issued under section 81-1702, as attempted to be amended by Chapter 122, are contrary to and in direct conflict with section 11 of the Enabling Act, and contrary to its specific direction that such lease "shall be for such term of years" as provided by the legislature.

For the reasons stated the judgment of the district court is reversed, with directions to such court to sustain the demurrers to said complaint and complaint in intervention, to dismiss such complaint and complaint in intervention, and to dissolve its order whereby the defendants and appellants have been prevented from selling or receiving bids upon any oil or gas lease for the production of oil and gas upon state school lands under R.C.M. 1947, Sec. 81-1702, as it

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stood prior to its amendment by Chapter 122, Laws of 1953. Remittitur will issue forthwith.

HARRY J. FREEBOURN,
Associate Justice.

We concur:

HUGH ADAIR,
Chief Justice.

R. V. BOTTOMLY,
Associate Justice.

Mr. Justice Bottomly specially concurring:

I concur in the foregoing majority opinion. However I wish to state that there is another serious question presented by this appeal.

The question is whether our legislature or our Congress may effectively and lawfully change the terms of the Enabling Act, without the consent of the majority of the electors of Montana at a duly proclaimed election held for that purpose.

The ordinances which were directly submitted to the people for their ratification at the polls as well as our Constitution are the fundamental law of this state. See State ex rel. Thompson v. Kenney, 9 Mont. 223, 236, 23 P. 733; 16 C.J.S., Constitutional Law, Sec. 11, p. 47.

Ordinance No. I, which, together with the Constitution of the state, was ordained and promulgated by the Constitutional Convention and adopted by the people at a duly proclaimed election, provides in section Sixth that "the ordinances in this article shall be irrevocable without the consent of the United States and *the people of said State of Montana.*" Emphasis supplied.

Section Seventh, Ordinance I, provides: "The state hereby accepts the several grants of land from the United

States to the State of Montana, mentioned in an act of congress entitled, 'An Act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington, to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states, and to make donations of public lands to such states.' Approved February 22, 1899, upon the terms and conditions therein provided."

This Ordinance, so duly approved by the electors of Montana, grants designated lands to the State of Montana which lands were accepted according to the condition and terms set forth and specified in the Enabling Act as follows:

"Sec. 10. That upon the admission of each of said states into the Union sections numbered sixteen and thirty-six in every township of said proposed states, and where such section, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the secretary of the interior; Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

"Sec. 11. That all lands herein granted for educational

purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such lands shall not be subject to preemption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Sections 10 and 11, supra, of the Enabling Act, together with our Ordinances and Constitution constitute the contract so approved by the people of Montana voting thereon and accepted by our Federal Government. Under the terms of our Ordinances and Constitution these terms may not be altered or varied without the consent of both the United States and the people of Montana. The requisite consent of the people has never been given or expressed. In fact such question has never as yet been submitted to the vote of the people of this state as is required, hence the proposed changes and amendments have never become effective.

The real parties in interest in the lands granted are the present and future taxpayers and the present and future generations of school children of Montana.

Under the original grant by our Federal Government to Montana and the provisions of our Ordinances and Constitution, the taxpayers and all electors of Montana are to be consulted whenever the Enabling Act is to be changed in any manner that will materially affect their interest.

Where is the law or equity in permitting or allowing the Congressmen from Maine to California, from Florida to Washington, in fact the Senators and Congressmen from all the states of the Union, to pass upon and decide a change

in or amendment to the fundamental laws of this state which primarily and directly affect and concern only the people of Montana and which cannot become effective without the approval of the electors of Montana?

Of course it is fundamental that such an amendment and Act of Congress would have no force or effect until and unless it is first approved by the people of Montana upon a duly proclaimed election where the measure is properly submitted to them for their ballot. This is a right, power and matter which the people of Montana reserved and retained in themselves to pass upon; it was a compact between the people of Montana and their Federal Government, and was a power and right reserved to themselves and not delegated to their legislative representatives.

The Enabling Act and Ordinances as a part of our fundamental law and the Constitution were first submitted to and approved by the people of Montana and thereafter the Ordinances and our Constitution were submitted to and approved by our Federal Government, and the whole thereof became a binding and sacred written agreement and contract between the citizens of Montana and our Federal Government.

One of the important terms and conditions of that covenant was that the Ordinances shall be *irrevocable without the consent of* each of the parties thereto, the United States *and the people of the State of Montana.* Not the United States and the state legislature, but the United States and the people of Montana. At that time, the first Tuesday in October 1889, the people, the electors, of Montana, well knew what the expression, "the people of said State of Montana," meant and that is what they approved by their votes. If at that time it had been advisable, or if it had been the intention of the people to delegate this power to their legislature, it could have been so stated.

An Ordinance framed and adopted by the Constitutional Convention and appended to the Constitution and with it submitted to and adopted by the people of Montana, has the same force and effect as a constitutional provision and the effect of such an Ordinance upon any Act or statute passed by the legislature, in conflict therewith, is to modify, change or annul the same as far as necessary to give the provisions of the Ordinance full scope, force and effect. See State ex rel. Thompson v. Kenney, supra; 16 C.J.S., Constitutional Law, Sec. 11, p. 47.

This right and power which the people reserved to themselves they may impart as much or as little of as they shall deem expedient. The people's welfare under our Ordinances and Constitution does not rest upon the transient circumstances of the hour, nor the accidental character of the majority of the legislature at any particular time.

Under the fundamental law of our state here in question, the legislature may not seek to bind the people of Montana without their ratification.

We are dealing here with the supreme law of our state; it is the people's voice, expressed by their vote; it is their own appointed mode through which they govern all of the people and their agents, representatives and officers. Neither the courts nor the legislature may transgress upon the expressed, enacted, basic law of the people themselves. Such provisions are mandatory and conclusive. Constitution of Montana, Art. III, Sec. 29; In re Weston, 28 Mont. 207, 212, 72 P. 512.

The attempt by courts or by legislation to whittle away the provisions of our Ordinances and parts of our Constitution is a dangerous practice—foreboding the final crumbling of our whole structure and form of government.

"All political power is vested in and derived from the people; all government of right originates with the people;

is founded upon their will only, and is instituted solely for the good of the whole." Constitution of Montana, Art. III, Sec. 1.

Section 30 of Article III declares that, "The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

It is true the legislature may speak on subject, questions and matters which are not reserved to the people, but on all reserved matters only the people themselves may speak. The legislature may submit a measure to the people for their approval and may order a special election thereon. This is all that is necessary for a lawful and constitutional disposition of this question.

It has been argued that such an interpretation and holding would be contrary to long practice and concurrence by the administrative officers and agents, legislative Acts and the decisions of this court. Noting all of this argument, it can be answered by stating that the basic question here raised was not pressed nor briefed in any of those decisions.

It is also argued that chaos would result by such a holding. The writer is convinced that under the law and rules of equity no great harm if any would result from such a holding, as parties to contracts heretofore entered into in reliance on legislation and any court decision would in no way be affected and such matters would be determined in accordance with the well established rules of equity set forth in the following cases. Gelpcke v. City of Dubuque, 68 U.S. 175, 17 L. Ed. 520; Havemeyer v. Iowa County, 70 U.S. 294, 18 L. Ed. 38, Douglass v. Pike County, 101 U.S. 677, 25 L. Ed. 968; Township of New Buffalo v. Iron Company, 105 U.S. 73, 26 L. Ed. 1024; City of Los Angeles v. Los Angeles City Water Co., 177 U.S. 558, 44 L. Ed. 866;

Tidal Oil Co. v. Flanagan, 263 U.S. 444, 63 L. Ed. 382; Levin v. Baltimore & O.R. Co., 179 Md. 125, 17 A. 2d 101; Hoven v. McCarthy Bros. Co., 163 Minn. 339, 204 N.W. 29; 97 A.L.R., n. 11, p. 516; 15 McQuillin, Municipal Corporations, Sec. 41, 11, p. 324.

For the foregoing reasons in addition to those set forth in the majority opinion I would hold that Chapter 122, Laws of 1953, is unconstitutional, the injunction vacated and the complaint dismissed.

R. V. Bottomly,
Associate Justice.

Mr. Justice Anderson:

The two foregoing opinions are contradictory of each other and it is my view that one cannot agree to both of them.

I am convinced that under the circumstances no one, the oil industry, the legislature, or the land board, will be able to determine any future course under said opinions and for that reason I deem it well to express my own views regarding the status of past, present and future oil and gas leases of federal land grants.

I think the land board of the state of Montana should be prevented from making oil and gas leases under the provisions of Chapter 122, Laws of 1953, and to this extent, but not for the same reasons, I agree with the majority opinions.

The present litigation arose out of an effort by the state land board to ignore the provisions of Chapter 122, Laws of 1953, and its attempt to enter into state oil and gas leases under a previous law having to do with the same subject matter. Such a practice is indeed unique and little if any precedent exists for it.

Ordinarily it is the duty and the function of the attorney general and a state board to uphold and carry out the legislative directive. Here in effect the attorney general and

the board attempted by their action to veto a legislative Act which power so far as I can determine is and always has been unauthorized in constitutional government.

It would seem to me that this court extends itself too far when it impliedly gives the attorney general and a state board such power. The same power may well carry on down to all state, county and city officers whose duty it is to enforce the laws. Subscribing to such a theory is in my opinion unwise.

I think a state board or the attorney general may, by proper proceedings, where a grave legal question is presented, see to it that the statute is questioned. But here the procedure seemingly set into motion was to by-pass a judicial determination of Chapter 122, Laws of 1953, and such apparently would have been accomplished if no outside party had intervened.

Inasmuch as this court and the court below have passed upon the questions presented, my reactions to them follow:

The issue resolved itself in favor of the relator in the court below. The lower court's view favored the expression of the 1953 legislature found in Chapter 122, Laws of 1953.

In the instant cause the attorney general originally advanced a great number of theories in support of appellants' position. However, upon argument, he abandoned all of the appellants' theories save one, i.e., under the terms of Chapter 122, Laws of 1953, the state will not be able to command the full market value for the disposal of its interest in oil and gas properties as said full market value is provided for by Article XVII, Sec. 1, Montana Constitution.

The discussions found in the briefs of the appellants and in an opinion of the attorney general to the effect that Chapter 122 violates the Federal Enabling Act, in respect to the full market value, was not referred to at the time of argument. See Atty. Gen. Opinions, No. 13, Vol. 25.

Apparently the majority of this court, during the delay in rendering its opinion, has forgotten the position taken by the land board at the time of argument and now chooses to bottom its findings upon the interpretation of the amendment to the Federal Enabling Act.

Although the majority of the court is adroit in avoiding the several questions presented by all parties to the issue I nonetheless intend to cover most of the points involved.

The questions regarding the intent and the right to adopt the amendment to the Enabling Act are covered well by the dissenting opinion of Mr. Justice Angstman. My only comment in this respect is that if the records before the Congress meant anything at all, which I think they do, the majority of the court necessarily disregarded said records in order to conclude what it did.

In any event, the language having to do with federal lands found in the Montana Constitution, for the most part, was obviously borrowed from the language in the Enabling Act and if it can be said the Constitution is violated, necessarily it may usually be said that the Federal Enabling Act is also violated.

This business of segregating the state question from the federal question regarding federal land grants for the disposition of state lands or interests therein causes strange results to follow, as I will presently point out.

In his argument the attorney general alludes to the provisions of R.C.M. 1947, Sec. 81-1704, as amended by the Laws of 1951, which law, for all practical purposes, puts a ceiling of 12½ per cent as the royalty that the State of Montana, acting through its land board, can exact under leases of state oil and gas properties.

The appellants pointed out at the time of argument that the full market value cannot be obtained under Chapter 122, Laws of 1953, when R.C.M. 1947, Sec. 81-1704, as amended

by the Laws of 1951, puts a fixed ceiling upon royalties on oil produced in quantities of less than 3,000 barrels per month per well to be exacted by this state. However, to carry out [illegible] appellants' argument in this respect to the ultimate by stating that R.C.M. 1947, Sec. 81-1704, as amended by the Laws of 1951, makes it impossible, in view of the 1953 law here directly in question, to obtain the "full market value" for oil and gas leases, would not be changed in the least if the State of Montana were to use any former leasing Act as appellants contend it should.

In State ex rel Dickgraber v. Sheridan, 126 Mont. 447, 254 P. 2d 390, 9 St. Rep. 40, this court held that the so-called "bonus" for oil and gas leases is "income or rental" as distinguished from "a disposition of a part of the corpus of the estate itself and thus capital in nature."

Quoting from the majority opinion in the Dickgraber Case regarding respondent's contentions, this court made the following findings: "That the oil and gas leases issued on school lands are not leases; that the transactions evidenced by written instruments labeled 'State of Montana Oil and Gas Lease' are not lease transactions at all but that, in legal effect, such transactions are sales; that any cash moneys paid out of pocket by the successful bidder for a state oil and gas lease that is in excess of the statutory minimum of 75c per acre are no part of the 'annual rental' on the lease * * * but all such moneys * * * are either (1) 'royalty,' (2) 'bonus' or (3) 'the proceeds from the sale or other permanent disposition' of the particular school lands described in the lease. *We find no merit in any of the above contentions so made.*" Emphasis mine.

It seems wanting to me in view of the fact that the state land board apparently shared the views of the majority of this court in the Dickgraber Case, that it did not pursue a course to prevent leases under the provisions of R.C.M. 1947, Sec. 81-1704, as amended by the Laws of 1951.

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Without the ruling in the Dickgraber Case it is at least conceivable that R.C.M. 1947, Sec. 81-1704, as amended by the Laws of 1951, might not fall within the inhibitions found in the Enabling Act and the Constitution and full market value for oil and gas leases may be obtained, but with that ruling it is obvious that section 81-1704, as amended, is of itself a violation of both the Enabling Act and the Constitution and as such provides the oil and gas industry with an advantage it was never intended to have.

I did not agree with the ruling in the Dickgraber Case when it was made, and I do not agree with it now; nonetheless it is the law of this state and remains such unless expressly overruled.

Either this court was wrong in its interpretation of the applicable provisions of the Enabling Act and the Constitution in the Dickgraber Case, or R.C.M. 1947, Sec. 81-1704, as amended by the Laws of 1951, clearly violates the Enabling Act and the Constitution of Montana, and whether the state leases its land under the 1953 amendment, supra, or under any former Act will not in any way change the results stemming from the ruling in the Dickgraber Case. This statement begs the question, why is that so.

Referring to the above quoted language from the Dickgraber Case, the so-called "bonus" is not for "a permanent disposition of the particular land itself or any part thereof" but is income in the nature of mere rent.

Had this court in the Dickgraber Case determined, as Mr. Justice Angstman and I did, that the so-called "bonus" was paid for the right to impair and diminish the fee, then it is conceivable at least that R.C.M. 1947, Sec. 81-1704, as amended, could meet the requirements of the Enabling Act and the Constitution having to do with full market value, but with its ruling the court precludes such a result.

The legislature may have had in mind the uncertainty of oil and gas explorations, thus may have intended that the

State of Montana exact a part of the market value for the right to diminish the fee at the time the lease is granted and the other part of the market value to be exacted in the nature of a fixed royalty if oil and gas are produced. By such an equation the state may thus receive for itself the best possible return for its oil and gas interests. The legislature, recognizing, and it being a known fact, that a great number of oil and gas prospects prove to be non-producers, full market value thus is placed upon the exploration itself on the theory of diminution regardless of discovery. The reserved fixed royalty conceivably would be sufficient for the complete assurance to the state of full market value for the whole thereof if discovery follows. The purpose of such an equation may, at least, encourage greater prospecting over a widespread area, all of which may result in the best ultimate benefit to the state. See, Bulletin, American Association of Petroleum Geologists, Vol. 37, No. 6, Table III, p. 1193.

Under such circumstances the state may have made its best bargain assuring to itself the full market value as is contemplated by the Enabling Act and the Constitution of this state.

Such a formula produces some logic to satisfy the ends sought by the Enabling Act and the Constitution regarding "full market value" but when the land board of the State of Montana, by statute, is limited to a fixed "royalty" and no more for gas and oil leases, no logic is convincing which would establish the fact that "full market value" can be obtained from a state land oil and gas venture.

This brings the state, as I see it, into the peculiar dilemma which is as follows: In the event the court was wrong in the Dickgraber Case, and I think it was, the "permanent school fund" is entitled to be paid, by the people of this state, the amount erroneously paid out as income funds by reason of the Dickgraber Case. (This is not a new ex-

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perience in Montana.) If this court was right in the Dickgraber Case, the leases entered into under R.C.M. 1947, Sec. 81-1704, as amended by the Laws of 1951, are void (because a royalty fixed is not market value) and must be cancelled forthwith and the money paid to the State of Montana for such leases must be returned to the lessees. State ex rel. Boorman v. State Board of Land Commissioners, 109 Mont. 127, 94 P 2d 201.

It appeared advisable to me when the Dickgraber decision was rendered that the questions there involved should have been decided upon both the state and federal questions involved and submitted to the United States Supreme Court for its determination because all of the state Acts and constitutional provisions applicable thereto find a source and thus the basis of authority in the Federal Enabling Act.

The confusion which is now apparent leaves the State of Montana and the oil industry in an undesirable quandary as to what should be done with state leases already in existence and state oil and gas lands which may in the future be leased.

I believe that the state land board cannot make leases under the terms of Chapter 122, Laws of 1953, but I believe with equal vehemence that, as the entire leasing laws of Montana now stand and in view of the ruling in the Dickgraber Case, supra, no substitute Act may be used in making oil and gas leases as is attempted by the appellants, without running clearly into the inhibitions found in the Federal Enabling Act and the Constitution of Montana.

Although R.C.M. 1947, Sec. 81-1704, as amended, was not squarely presented in the proceedings below it was brought to our attention by argument and I think it proper to point out its effect upon other existing statutes and decisions.

The validity of the 1953 laws was challenged by the state land board upon the theory that a prior Act having to do

with the same subject is valid and thus can be used in making state oil and gas leases. Under the circumstances, the results which follow, if leases are made under a prior law, are questions, the answer to which, this or any other court should give.

No one part of the leasing law of the State of Montana should be torn loose from the rest of the law for the purpose of a determination of its constitutionality, when as is shown, chaos from such a practice may or does result.

Until and unless the differences herein pointed out are set at rest by this court or by higher authority, it is my opinion that the state land board is powerless to make any oil and gas leases with anybody under any existing law now appearing in the Codes of this state.

By reason of the confusion present in the opinions herein rendered, I do not agree that remittitur should issue forthwith and in this respect Mr. Justice Angstman assures me that he agrees.

FORREST H. ANDERSON,
Associate Justice.

Mr. Justice Angstman dissenting:

Months ago and during the 11 months' period of gestation which produced the opinions prepared by Mr. Justice Freebourn and Mr. Justice Bottomly (the case having been argued to this court in January 1954), I wrote my views on all the contentions made by the attorney general.

While the opinion of Mr. Justice Freebourn is based upon but a single point I shall state my views on each point raised by the attorney general.

As stated in the opinion of Mr. Justice Freebourn, relator brought this proceeding to enjoin the defendants from conducting any sales or receiving any bids upon leases for oil and gas upon any school trust lands upon terms other than those prescribed by Chapter 122, Laws of 1953. The peti-

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tion alleges in substance that the attorney general has held Chapter 122 to be unconstitutional and that the defendant board in consequence threatens to, and unless restrained from so doing, will present for competitive bidding certain school lands for oil and gas leases on forms used prior to the passage of Chapter 122, Laws of 1953. Ford Johnson was permitted by the court to intervene in the case. He takes the same view of the law as does relator.

Demurrers were filed to the petition of relator and to the complaint in intervention which were overruled by the court. Defendants elected not to plead further. Judgment was accordingly entered in favor of relator and in favor of plaintiff in intervention for the relief demanded by them. Defendants have appealed from the judgment.

There are two principal questions presented by the appeal. First, does Chapter 122, Laws of 1953, violate the Enabling Act, and second, does it violate the state Constitution? The district court answered both questions in the negative.

Chapter 122 authorizes leases "for a primary term or period of ten (10) years, and as long thereafter as oil or gas in paying quantities shall be produced thereunder."

Section 11 of the Enabling Act was amended by Congress in 1948 (62 Stat. 170) to read as follows: "* * * Leases for the production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective states * * *." This was done upon request of the Montana legislature contained in Senate Joint Memorial No. 7 (1947 Session Laws, p. 811). It was accepted by the Montana legislature in 1949 (Ch. 18, Laws of 1949).

The attorney general contends that a lease in the form

prescribed by Chapter 122 is not authorized by the amended Enabling Act. His contention is that the lease authorized by Chapter 122 is not for a term of years as provided in the amended Enabling Act.

The complaint in intervention contains the history of the amendment in the Congress of the United States and a copy of the report of a legislative committee of the House wherein is contained an explanation of the bill, which among other things, states: "The purpose of this bill, as amended, is to amend the enabling act of the States of North Dakota, South Dakota, Montana, and Washington, whereby these States will be permitted to make leases for the life of the well on oil-bearing property rather than for a limited period of time, as is required by the present law."

To the committee report was attached a statement by the department of the interior approving the proposed amendment in which it was stated, among other things, as follows: "The general practice as to public lands at present is to issue oil and gas leases for a definite term and so long thereafter as oil and gas are produced. I know of no reason which would militate against extending authority to the State to do likewise with respect to its school lands."

It has long been the rule that in construing a constitutional provision (and the same rule would apply to the Enabling Act), the proceedings and debates of the framers and the history of the measure may be examined as tending to show what its terms were understood to mean. State v. Camp Sing, 18 Mont. 128, 44 Pac. 516, 32 L.R.A. 635, 56 Am. St. Rep. 551; Murray Hospital v. Angrove, 92 Mont. 101, 10 P. 2d 577; Nichols v. School District, 87 Mont. 181, 287 P. 624; State ex rel. Federal Land Bank v. Hays, 86 Mont. 58, 282 P. 32; State ex rel. Vickers v. Board of County Comm'rs, 77 Mont. 316, 250 P. 606. The same rule prevails in the United States Supreme Court. United States v.

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Flores, 289 U.S. 137, 77 L. Ed. 1086; McFeely v. Commissioner of Internal Revenue, 296 U.S. 102, 80 L. Ed. 83; McLean v. United States, 226 U.S. 374, 57 L. Ed. 260; Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. E. 226.

If there were any doubt about the meaning of section 11, as amended, and particularly as to whether it authorized a lease for as long as oil or gas is produced on the land, that doubt is completely dispelled by the legislative committee report as to the purpose of the Act under consideration. That report clearly shows the purpose to be to authorize leases "for the life of the well rather than for a limited period of time." I think Chapter 122 is in harmony with amended section 11 of the Enabling Act.

But the attorney general contends that amended section 11 never was properly accepted by the State of Montana. He points out that when the state accepted the grants of land by the seventh section of Ordinance No. I of the Constitution of Montana, it also adopted the sixth section reading, "That the ordinances in this article shall be irrevocable without the consent of the United States and the people of said State of Montana." He contends that the people of Montana never consented to the amendment by congress of section 11 of the Enabling Act.

This question is not properly presented in this proceeding. The complaint in this action alleges that defendants are threatening to receive bids on school lands for oil and gas leases on forms used prior to those prescribed by Chapter 122.

Section 11 of the Enabling Act has been amended several times before the one made in 1948 and the amendment in each instance was accepted by the Montana legislature and not by a vote of the people of Montana. It follows that if the attorney general's contention that a vote of the

people be necessary, then all leases made under the law under which he proposes to operate would likewise be invalid. In other words, his contention, if sustained, would not justify a lease in the form which he advises and which defendants threaten to issue. The consent of the people of Montana under Ordinance I, sec. 6, of the Constitution is properly expressed by the legislature of Montana. That a vote of the people was not contemplated is quite plain from the ordinances themselves. Thus by section 2, the Convention itself expressed the agreement of the people of Montana without an election, and section 6 of Ordinance I simply means that the people of Montana may give their consent through their duly elected representatives just as the consent of the United States is given through Congress. But it is certain that if leases cannot be granted under Chapter 122 for want of an acceptance of the amended Enabling Act by the people of Montana, then they cannot be granted under the laws in effect prior to its passage because those laws are subject to the same objection.

The next contention of defendants is that Chapter 122 is unconstitutional as being in conflict with Article XVII, Sec. 1, of our Constitution which prohibits the disposition of state lands "unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state." Their contention is that under section 3 of Chapter 122 the legislature recognizes that a lease for as long as oil and gas is produced is worth more than a 20-year lease and has a value in excess of the agreed royalty payment since it gives to holders of leases for a 20-year term the right to exchange them for the type of lease provided in Chapter 122 upon payment of a sum "which is the full market value of the exchange as determined" by the board of land commissioners.

There is, of course, no question but that a lease for as long as oil and gas is produced is more valuable than a 20-year lease. The point overlooked by defendants is that this value is taken into account at the time the bid is made for the lease.

It is the competitive bidding, pointed out in State ex rel. Dickgraber v. Sheridan, 126 Mont. 447, 254 P. 2d 390, and as to this there was no disagreement among the members of this court, that brings to the state the market value of the lease. That a lease for such period as oil or gas is produced is worth more than a 20-year lease is conceded in this case.

In relator's petition it is alleged "that the failure and refusal of the defendant Land Board to offer a lease for oil and gas on state lands in the form and terms of said Chapter 122 * * * will result in a reduction in the amount of money that will be bid as first year rental for said leases by the representatives of such industry, and will reduce the amount of money that will be available for distribution to the school districts as distributive share of the said interest and income fund for the fiscal year 1953-54." This allegation is admitted for the purpose of the demurrer. A few of the many cases declaring this to be the rule are: State ex rel. Stuewe v. Hindson, 44 Mont. 429, 120 P. 485; Manley v. Harer, 73 Mont. 253, 235 P. 757; Mills v. Pope, 90 Mont. 569, 4 P. 2d 485; Rhodes v. School District No. 9, 115 Mont. 352, 142 P. 2d 890, 160 A.L.R. 1; Davis v. Park Securities Corp., 117 Mont. 393, 159 P. 2d 323.

Defendants contend that the only way to obtain the actual market value of a lease after oil or gas is discovered is to have competitive bidding after the discovery of oil or gas. If this contention were sound, then the same objection, but in lesser degree, would lie against the 20-year lease. In other words, a 20-year lease might be producing oil for

nearly the full 20-year period, and in fact, all the oil or gas may be recovered within the 20-year period without ascertaining the value of the lease by competitive bidding after the discovery of oil or gas.

Such a conclusion would nullify all the leases heretofore issued and would make it impossible to lease lands for oil and gas purposes in the future because no one would bid for a lease knowing that upon the discovery of oil or gas it would be thrown open for competitive bidding. Only one well out of nine results in production (Bulletin, American Association of Petroleum Geologists, Vol. 37, No. 6, Table III, p. 1193); hence those who embark upon such an undertaking know that is is speculative in character. This court has so recognized it. Steven v. Potlatch Oil & Ref. Co., 80 Mont. 239, 260 P. 119. Notwithstanding its speculative and uncertain character, yet it has a market value. Montana Ry. v. Warren, 6 Mont. 275, 12 P. 641.

In affirming the opinion in the Warren Case, supra, the United States Supreme Court said: "That this mining claim, which may be called 'only a prospect,' had a value fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such 'prospects' are the constant subject of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such 'prospect' has a market value * * *" Montana Ry. v. Warren, 137 U. S. 348, 34 L. Ed. 681.

Likewise this court has held that the requirements of obtaining the full market value are met by competitive bidding at the time the lease is issued. State ex rel. Robbins v. Bonner, ——— Mont. ———, 270 P. 2d 400, 11 St. Rep. 215. If subsequently the lease obtains a greater value the lessee may not be compelled ' pay more than the rental

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provided in the lease because that would not be a "legitimate advantage" but an "illegitimate advantage." Rathbone v. State Board of Land Comm'rs, 100 Mont. 109 47 P2d47.

As well might it be contended that if the driller encounters a dry hole which eight out of nine are, then the state should reimburse him for the drilling expense. "Market value" is the amount that would be arrived at by fair negotiations between a willing seller and a willing buyer. Rider v. Cooney, 94 Mont. 295, 23 P. 2d 261; United States v. Miller, 317 U.S. 369, 87 L. Ed. 336.

The Supreme Court of North Dakota has upheld a lease under the amended Enabling Act which was identical with that authorized by Chapter 122 as against the contention that it was unconstitutional. State ex rel. Rausch v. Amerada Petroleum Corp., 78 N. D. 247, 49 N. W. 2d 14.

Defendants contend that under the Constitution the land board is a trustee for the sale and leasing of school lands. This contention is correct. Reasoning from there, they contend that while the legislature may "make regulations and restrictions" (Art. XI, sec. 4, Constitution), the board must administer the trust so as to obtain the largest measure of legitimate advantage to the state, and in any case principles of trust law should be applied and the trustee must use the same degree of prudence in the management of the trust as he would use in his own affairs. By the amendment to the Enabling Act, Congress provided how the trust shall be carried out. It provided that the leases may be "for such term of years and on such conditions as may be from time to time provided by the legislatures." Chapter 122 was enacted pursuant to this authorization. It constitutes "regulations and restrictions as may be prescribed by law" within the meaning of Article XI, Sec. 4, of our Constitution. Leuthold v. Brandjord, 100 Mont. 96, 47 P. 2d 41.

As evidence of the fact that the trust will be prudently

administered by executing leases under Chapter 122 is the fact that the United States has for some time been leasing its public lands on identical terms provided in Chapter 122, and individuals and corporations throughout the state have leased their own lands on the same terms and conditions as contained in Chapter 122. The standard of care required of a trustee is stated in 54 Am. Jur., Trusts, sec. 322, p. 256, as follows: "Generally, the standard or measure of care, diligence, and skill required of a trustee in the administration of a trust is that of an ordinarily prudent man in the conduct of his private affairs under similar circumstances, and with a similar object in view."

I think the district court properly held that Chapter 122 is not unconstitutional and that it is in harmony with amended section 11 of the Enabling Act and that the judgment should be affirmed.

ALBERT H. ANGSTMAN,
Associate Justice.

APPENDIX B

1. Judgment of the Supreme Court of Montana.

IN THE SUPREME COURT OF THE STATE OF MONTANA

(Reversed)

No. 23746

December Term, A.D. 1954

Filed Dec. 31, 1954. Frank Murray, Clerk of Supreme Court, State of Montana.

The Chief Justice of the Supreme Court of the State of Montana:

To the Honorable Judge of the District Court of the First Judicial District, in and for the County of Lewis & Clark & the Clerk of the District Court, Greeting:

WHEREAS, In the said District Court in a cause between State of Montana, ex rel. Willis B. Jones, Relator, and Respondent and State Board of Land Commissioners, et al., Defendants and Appellants wherein the Judgment of the said District Court, entered in said cause on the 31st day of July A.D. 1953 was in favor of the said Relator and Respondent, and against the said Defendants and Appellants as by the inspection of the transcript of record of said Court in said cause which was brought into the Supreme Court of said State by virtue of an appeal, agreeably to the statute of said State and the rules of said Supreme Court in such case made and provided, fully and at large appears.

AND WHEREAS, in the December term of court in the year of our Lord, one thousand nine hundred and fifty-three said cause came on to be heard before said Supreme Court and was argued by counsel.

Whereupon, on consideration, it is now here ordered and adjudged by this Court that the Judgment of the Court below, entered in this cause on the 31st day of July, A.D. 1953 is reversed, with directions (copy of Opinion attached.)

Costs in this Court: Respondent Appearance—$10.00.

December 10, A.D. 1954

You, Therefore, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, not inconsistent with the opinion hereto attached.

Witness: The Honorable Hugh Adair, Chief Justice of the Supreme Court of the State of Montana, this 10th day of December, A. D. 1954.

Fred Lay,
Acting Clerk of the Supreme Court of the State of Montana.

State of Montana,
County of Lewis and Clark, ss.

I hereby certify that the instrument to which this certificate is annexed is a true, correct and compared copy of the original on file in the office of the Clerk of the District Court.

Witness my hand and the seal of the District Court of Lewis and Clark County, this 30 day of December, 1954.

David R. Kemp, *Clerk of District Court.*
By (S.) K. Dogenais, *Deputy Clerk.*

2. Judgment of the District Court of the First Judicial District of the State of Montana in and for Lewis and Clark County.

(Title of Court and Cause)

Judgment

The above entitled action came on for hearing this day before the above entitled court sitting without a jury upon

the application of the relator and the relator and plaintiff in intervention for judgment (1) enjoining the defendants, their agents, representatives, attorneys and servants from conducting any sale or receiving any bids upon any lease for the production of oil and gas upon any school trust lands of the state of Montana upon any terms other than those prescribed and established by Section 1 of Chapter 122 of the Laws of Montana of 1953 and (2) declaring that Section 1 of said Chapter 122 of the Laws of Montana of 1953 does not violate the Montana Enabling Act as amended, and that said Enabling Act, as amended, authorizes such leases as are prescribed and provided for in said Section 1 of Chapter 122 of the Laws of Montana of 1953;

And the court finds that the defendants appeared herein by motion to dissolve the temporary injunction heretofore issued herein and that the defendant, J. Hugo Aronson, separately appeared by answer in which he admitted all of the material allegations of the application or complaint of relator;

The court further finds that upon proper motion an order was made granting leave to Ford Johnson to file a complaint in intervention herein and said complaint in intervention has been so filed;

The court further finds that the defendant, state board of land commissioners, did file its demurrers herein to the application of plaintiff and to the complaint in intervention, respectively, and that said demurrers were overruled and the motion to dissolve the temporary injunction was denied and the defendants were given ten days to plead further, whereupon the defendant, state board of land commissioners, filed in this court its election in writing to stand on its demurrers and to file no further pleadings in this cause and waived time to further plead; and

The court further finds and concludes that this proceed-

ing involves no determination of any issues of fact and in view of the foregoing proceedings relator's application or complaint for an injunction and the complaint in intervention of the relator and plaintiff in intervention are now heard and considered by the court upon the relator's application or complaint herein and the complaint in intervention of the relator and plaintiff in intervention herein as all material allegations thereof have in effect been admitted by the pleadings, and the court being duly advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the relator and the relator and plaintiff in intervention are entitled to judgment as demanded in their application and complaint in intervention, respectively, in this action:

NOW, THEREFORE, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

1. The defendants, their agents, representatives, attorneys and servants be, and they are hereby permanently enjoined and restrained from conducting any sale or receiving any bids upon any lease for the production of oil and gas upon any school trust lands of the state of Montana granted to it by the Enabling Act (25 Stat. 676) upon any terms other than those prescribed and established by Section 1 of Chapter 122 of the Laws of Montana of 1953;

2. Section 1 of said Chapter 122 of the Laws of 1953 does not violate the provisions of the Enabling Act of the state of Montana (25 Stat. 676) as amended by Public Law 480, second session 80th Congress (62 Stat. 170), accepted by the state of Montana by the thirty-first legislative assembly of the state of Montana (Chapter 18 of the Laws of 1949), and said Enabling Act, as amended, authorizes such leases as are provided for in said Section 1 of said Chapter 122 of the Laws of Montana of 1953;

3. Section 1 of said Chapter 122 of the Laws of 1953 does not violate or contravene any constitutional provision of the state of Montana.

Done in open court this 31st day of July, 1953.

(S). VICTOR H. FALL,
District Judge.

Filed, July 31, 1953.

APPENDIX C

Excerpt from Specification of Errors and Argument, Brief of Appellants in Montana Supreme Court, p. 8, contained in record certified to this Court, p. v.

(Title of Court—Title of Cause)

(Specification of Errors)

3. The court erred in holding that Chapter 122, Laws of 1953, did not violate the Enabling Act of the State of Montana.

4. The court erred in holding that Chapter 122, *supra*, did not violate any provision of the constitution of the State of Montana.

ARGUMENT

The only point of law raised in the lower court was the question of the validity of Chapter 122, Laws of 1953, under the Montana Constitution and Enabling Act. It is the contention of the appellants that Chapter 122 violates the Enabling Act, and several provisions of the Constitution of Montana.

FILED
MAR 3 1955
HAROLD B. WILLEY, CL

No. 567

Supreme Court of the United States

OCTOBER TERM, 1954

STATE OF MONTANA, EX REL. FORD JOHNSON,
Petitioner,
v.
THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, AS GOVERNING BOARD OF THE DEPARTMENT OF STATE LANDS AND INVESTMENTS; J. HUGO ARONSON, GOVERNOR OF THE STATE OF MONTANA, PRESIDENT OF SAID BOARD; MARY M. CONDON, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF MONTANA; SAM W. MITCHELL, SECRETARY OF STATE OF THE STATE OF MONTANA; ARNOLD H. OLSEN, ATTORNEY GENERAL OF THE STATE OF MONTANA, AS MEMBERS OF SAID BOARD; AND LOU W. BRETZKE, COMMISSIONER OF STATE LANDS AND INVESTMENTS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

REPLY BRIEF FOR PETITIONER

WILLIAM J. JAMESON,
Billings, Montana.
RALPH J. ANDERSON,
Helena, Montana.
DEAN ACHESON,
CHARLES A. HORSKY,
W. GRAHAM CLAYTOR, JR.,
701 Union Trust Building,
Washington, D. C.,
Attorneys for Petitioner.

Of Counsel:
COVINGTON & BURLING,
Washington, D. C.
COLEMAN, JAMESON & LAMEY,
Billings, Montana

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

REPLY BRIEF FOR PETITIONER

The Brief in Opposition filed herein does not discuss the importance of the question presented by the Petition, nor does it seek to sustain the interpretation of the Congressional Enabling Act by the court below. Rather, the brief seeks to avoid both these matters by asserting (a) that the case is moot; (b) that no Federal question is involved; and (c) that there is no conflict of decisions. All of these contentions are without substance, but since the first two of

them are not covered by the Petition, this brief reply appears to be warranted.

I

Respondents' contention that the action is moot (pp. 1-6) is grounded on the argument that the original relator, Willis B. Jones, sought injunctive relief solely with respect to a proposed leasing of some 76 parcels of school land, and that as of the present time all of these parcels have either been leased, or applications for leases with respect to them have been withdrawn. There are two answers.

1. First, even were the matter to be considered, as respondents seek to do, solely on the basis of the original application for injunction filed by relator Willis B. Jones, there is still a controversy before this Court. Jones's original application requested a temporary restraining order as well as a permanent injunction, and hence described in detail the 76 parcels which were shortly to be leased. However, Jones's application also sets forth (R. 5) that "unless restrained by this court, the defendants will proceed to receive bids for and will issue leases for oil and gas upon terms" inconsistent with the 1953 statute. His prayer (R. 6) was for a temporary injunction and a temporary restraining order to prevent respondents from "conducting any sale or receiving any bids upon any lease for oil and gas upon any school trust lands upon any terms other than those prescribed and established by the Legislature of the State of Montana in Chapter 122, Montana Session Laws, 1953", and that upon final hearing a peremptory writ issue "commanding said defendants to do and perform such acts and things as may be necessary in the premises".

Neither prayer is limited as to time, nor confined to the 76 proposed leases. Even were the prayers ambiguous, however, that ambiguity has been resolved by the courts below. Neither the trial court (R. 72), nor the Supreme

Court of Montana (Pet. App. p. 1) construed the application as limited to any particular parcels of school lands. This Court has recognized since *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 308-309, that an application for injunctive relief does not become moot because the conduct immediately complained of has terminated, if there is a likelihood that the same conduct will be continued in the future. See *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43. Here there is not a likelihood, but a virtual certainty, that in future leases of Montana school lands respondents will continue to ignore the 1953 Montana statute—unless an injunction issues. Indeed, they have already done so; the Brief in Opposition, by annexed affidavit, admits that shortly after the trial court injunction was dissolved by the court below, several leases were entered into by respondents which did not comply with the 1953 statute. Respondents do not suggest that they have changed, or will change, their position that the 1953 law is invalid, nor do they assert any intention of complying with it in the future. Respondent Olsen, as Attorney General, has advised the State Board of Land Commissioners that the 1953 law is invalid, and the majority of the Board has formally "accepted" that opinion. See R. 18. *Cf. United States* v. *Trans-Missouri Freight Association*, 166 U.S. at p. 309. Respondent's violent attack on the policy of the 1953 law (Brief, pp. 10-11) leaves no doubt that they have no intention of abiding by its terms.

2. Even if petitioner were limited to the allegations and prayer for relief contained in the original Jones application, therefore, the cause would not be moot. But apart from that, even respondents do not deny that petitioner's Complaint in Intervention, and the prayer for relief therein, are in no way limited to the 76 parcels of school land which have now been leased or on which pending

applications have been withdrawn. The Complaint in Intervention sought a continuing injunction against *any* lease of *any* Montana school lands which did not comply with the Montana statute. The prayer (R. 21) was for a permanent injunction "directing that any oil and gas leases on public school lands . . . be in accordance with the provisions of" the 1953 law, and "restraining the State Board of Land Commissioners from issuing oil and gas leases on such public school lands in accordance with and pursuant to" the pre-1953 law.

For the reasons noted above, *this* issue is very much alive; respondents will issue future leases in accordance with the 1953 act only if so directed by injunction. Respondents tacitly admit (p. 3) that petitioner's Complaint in Intervention presents a continuing controversy which is *not* moot, but seek to avoid *that* controversy by asserting that because petitioner is an intervenor, he "could not demand relief to which the original applicant would not be entitled."

Montana law imposes no such restrictive rule. On the contrary, the Montana statute (Mont. Rev. Codes 1947, Sec. 93-2826) specifically provides for the filing, with leave of court, of a complaint in intervention, to which the parties to the original action "may answer or demur . . . as if it were an original complaint". The statute, moreover, expressly contemplates a complaint in intervention which presents new and different allegations and prayers for relief by providing that it may even take the form of "demanding anything adversely to both the plaintiff and the defendant".[1] The trial judge, of course, has discretion, in

[1] In fact, new and different allegations or prayers for relief were made in both the Montana cases cited in respondent's brief (p. 3). State Bank of New Salem v. Schultze, 63 Mont. 410, 209 P. 599 (1922); State ex rel. Westlake v. District Court, 118 Mont. 414, 167 P. 2d 588 (1946). In the Schultze case, where the right of the intervenor to seek different relief was upheld, the court stated (63 Mont. at p. 420; 209 P. at p. 603): "While it is true that an intervener must accept the action pending as he finds it at the time of the intervention [citing cases etc.], yet

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granting or denying leave to file the complaint in intervention, "as to what measure of latitude he shall allow one who seeks to intervene, keeping mind at all times the purpose to do justice to one who applies in good faith", and the purpose of the intervention statute "to avoid circuity of action and needless multiplicity of suits". *State ex rel. Westlake* v. *District Court*, 119 Mont. 222, 235, 173 P. 2d 896, 902 (1946).

Here petitioner's Complaint in Intervention did not introduce any fundamentally new issues, and the relief he sought, if different at all from that sought by the original relator, was merely supplemental. When the trial court allowed the Complaint in Intervention (R. 30), petitioner became a party in his own right. Respondents filed a demurrer (R. 46), as the statute provided, without challenging petitioner's right to intervene or the scope of the relief sought. The trial court found that all of the material allegations of the Complaint in Intervention were admitted by the pleadings, and issued a final injunction in substantially the form in which petitioner had requested it. R. 73-74. The court below likewise accepted the case on that basis, with no suggestion that petitioner was limited in any such way as now suggested by respondents, and with no suggestion that the controversy was limited to the 76 parcels of land noted in the original injunction application. See Pet. App. pp. 1-2.

For either or both of these two reasons, therefore, the case is by no means moot. Indeed, developments since

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thereafter his rights are as broad as those of the other parties to the action." The intervenor, in other words, may not challenge the jurisdiction and pleadings of the original suit as they stand when he petitions for intervention, but if his intervention is allowed, the Complaint in Intervention stands as asserting a cause of action on his behalf just as it would if it had been filed as an original pleading. In a sequel to the Westlake case cited by respondents, the Supreme Court of Montana reviewed the Montana cases on intervention, and upheld the right of an intervenor to introduce new issues. State ex rel. Westlake v. District Court, 119 Mont. 222, 173 P. 2d 896 (1946).

the action was instituted in 1953, rather than rendering the case moot, have rather made the controversy between petitioner and respondents even more clearcut. Petitioner, as a taxpayer on property for the support of the public schools in Lewis & Clark County (R. 17) has suffered substantial direct pecuniary loss as a result of respondents' action in disregarding the provisions of the 1953 law. Petitioner will continue to suffer such losses unless he receives the relief sought by his Complaint in Intervention, which was granted by the trial court but set aside by the court below. The official statistics contained in the separate brief filed in this Court by respondent Governor Aronson (see pp. 4-7) give additional substance to the allegations of irreparable damage to petitioner contained in his Complaint in Intervention, R. 21. These figures illustrate in striking fashion how deficiencies in income from oil and gas leases of school lands, which it is alleged will result from respondents' improper disregard for the 1953 law, are required by State law to be made up by additional levies on petitioner's property in Lewis & Clark County, and how in fact those levies have occurred since the decision by respondents to ignore the 1953 law as invalid.

II

Respondents' second contention—that there is no Federal question presented—is of even less substance. Respondents do not deny, of course, that the interpretation of Section 11 of the Enabling Act as amended by Congress in 1948 presents a Federal question (cf. *Montana ex rel. Haire* v. *Rice*, 204 U.S. 291, 298), but they seek to avoid that conclusion by arguing (pp. 6-7) that the decision below rested upon an interpretation of the Montana statute accepting the amendment (Montana Laws 1949, Chapter 18) rather than an interpretation of Section 11.

The argument is refuted simply by reading the opinions below. The Supreme Court of Montana rested its decision

solely on an interpretation of the Congressional Enabling Act itself, not on any State legislative action. See Petition, pp. 7-8.

Furthermore, even a casual consideration of the pertinent Montana legislation shows that respondents' contention has no substance. The Montana legislature first memorialized Congress to amend Section 11 of the Enabling Act in order to accord to Montana the authority to lease school lands for as long as oil or gas was produced thereon (March 3, 1947, 93 Cong. Rec. 2426). When the amendment was enacted by Congress, Montana, as respondents concede (p. 7), unconditionally accepted that amendment. Montana Laws 1949, Chapter 18. Finally Montana exercised this newly granted authority in unmistakable terms in the 1953 Leasing Act (quoted in Petition, p. 4). Under these circumstances, even if the decision of the court below were ambiguous, which it is not, it is patent that what was involved was the interpretation of Section 11—a Federal question—and not an interpretation of Montana's acceptance of the Federal Act.

III

The conflict between the decision below and that of the Supreme Court of North Dakota in *State ex rel. Raasch* v. *Amerada Petroleum Corp.*, 78 N.D. 247, 49 N.W. 2d 14 (1951), has already been noted in the Petition (pp. 17-19), and in any event is not determinative; the importance of the question presented is alone sufficient to warrant review by this Court. Respondents are in error, however, in denying that a conflict exists (pp. 7-8). The opinion of the Supreme Court of North Dakota makes it clear that the plaintiff in that case attacked, under this very provision of the Enabling Act, the validity of a lease for a fixed term and as long thereafter as oil or gas was produced—the form of lease required by the 1953 Montana law—and the court upheld the validity of the lease. The At-

torney General of North Dakota is clearly correct in concluding in his brief filed in this proceeding, as *amicus curiae*, that

> "The decision of the Supreme Court of Montana which is sought to be reviewed here is squarely in conflict with the *Amerada Petroleum Corp.* case on the interpretation of Section 11 of the Enabling Act, as amended."

CONCLUSION

For the reasons set forth in the Petition, now concurred in and reinforced by the brief filed by the Governor of Montana, and by the briefs filed by States of North Dakota and South Dakota as *amici curiae*, the prayer of the Petition should be granted.

Respectfully submitted,

WILLIAM J. JAMESON,
Billings, Montana.
RALPH J. ANDERSON,
Helena, Montana.
DEAN ACHESON,
CHARLES A. HORSKY,
W. GRAHAM CLAYTOR, JR.,
701 Union Trust Building,
Washington, D. C.,
Attorneys for Petitioner.

Of Counsel:

COVINGTON & BURLING,
Washington, D. C.
COLEMAN, JAMESON & LAMEY,
Billings, Montana.

MARCH, 1955.

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[illegible]

STATE [illegible]

Petitioner,

vs.

THE STATE [illegible] BOARD OF [illegible] OF THE [illegible], a [illegible], [illegible] Board of the [illegible] of [illegible] and [illegible], [illegible] HUGO [illegible], Governor of the State of Montana, President of said Board, JAMES M. [illegible], Secretary, Member of said Board, [illegible] Auditor of the State of Montana, SAM W. [illegible], Secretary of State of the State of Montana, ARNOLD H. OLSEN, Attorney General of the State of Montana, and LOU W. BRUTGER, Commissioner of State Lands and Investments,

Respondents.

Brief In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Montana

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ARNOLD H. OLSEN,
Attorney General of the State of Montana,
Helena, Montana

WILLIAM F. [illegible],
Assistant Attorney General,
Attorneys for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1954

No._____

STATE OF MONTANA, ex rel. FORD JOHNSON,

Petitioner,

vs.

THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, as Governing Board of the Department of State Lands and Investments; J. HUGO ARONSON, Governor of the State of Montana, President of said Board; MARY M. CONDON, Superintendent of Public Instruction of the State of Montana; SAM W. MITCHELL, Secretary of State of the State of Montana; ARNOLD H. OLSEN, Attorney General of the State of Montana, as members of said Board, and LOU W. BRETZKE, Commissioner of State Lands and Investments,

Respondents.

Brief In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Montana

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1. THE QUESTION IS MOOT

The Court is being asked, in this action, to render an advisory opinion upon an issue which is no longer in controversy.

This case began with an application for an injunction by a Montana taxpayer named Willis B. Jones to enjoin the leasing of seventy-six (76) named and described tracts

of school land in Montana. He alleged, as the basis for his injunction, that less money would be gained from the competitive bidding on these leases if the leases were let upon the terms then contemplated by the State Land Board. The application for the injunction recited in Paragraph X:

> "That on the 29th day of April, 1953, at 10:00 o'clock A. M., at the State Capitol in Helena, Montana, and pursuant to the direction of the defendant State Land Board, *certain school lands, a list of which is hereto attached and by this reference made a part hereof,* will be presented for competitive bidding for oil and gas leasing; that said leases will be made on the form of lease used prior to the aforesaid legislative action of the 1953 session of the Montana Legislature; and that such letting will be conducted by the defendant Lou W. Bretzke as Commissioner of State Lands and Investments." (Emphasis supplied).

Again in Paragraph XII the relator, Mr. Jones, said:

> "That the failure and refusal of the defendant Land Board to offer a lease for oil and gas on state lands in the form and terms of the said Chapter 122, which terms are more advantageous to and desired by the oil industry, will result in a reduction in the amount of money that will be bid as first year rental for *said leases* by the representatives of such industry; and will reduce the amount of money that will be available for distribution to the school districts as a distributive share of the said Interest and Income fund for the fiscal year 1953-54." (Emphasis supplied).

For his remedy, the relator requested the Court that after hearing "a peremptory writ issue, such as shall be meet

and equitable, commanding said defendants to do and perform such acts and things as may be necessary and proper in the premises." The list of tracts of land was made part of the Complaint in the action by the reference in Chapter 10; through inadvertence this list was not included in the transcript of the case presented to the Montana Supreme Court. There can be no doubt that the injunction, although worded in general terms, applied only to the subject matter put in issue by the relator Jones; that is, the seventy-six (76) tracts of land which had been scheduled for sale on the 29th day of April, 1953. Ford Johnson, the petitioner here, was an intervenor in the action below. As such, he was required to take the action as he found it, and his rights were as broad, but no broader, than those of the original applicant. (State ex rel. Westlake v. District Court, 119 Mont. 222, 167 Pac. (2d) 588, State Bank of New Salem v. Schultz, 63 Mont. 410, 209 Pac. 599). He could not demand relief to which the original applicant would not be entitled on the showing made in the application.

During the pendency of this action and prior to the final decision upon the point by the Montana Supreme Court, all of the persons who had applied for the leases which were to have been let at the sale on April 29, 1953, asked that their applications be withdrawn. A policy of the Land Board in effect for many years requires that each application be accompanied by a deposit of money sufficient to cover the statutory minimum first-year rental if no higher bids for the lease are received. All of the applicants for

leases in this action had, before the decision of the Montana Supreme Court was handed down and long before this petition for certiorari, asked for and received the return of their deposits. Upon this return, their applications were completely and finally withdrawn.

No leases on oil and gas lands are ever let by the State Board of Land Commissioners without application. At the present time there are no applications for leases upon any of the tracts which were in issue in the Jones case. A sale of state leases was announced and held after the decision of the Montana Supreme Court in this case and before this petition for certiorari. There were no applications for any of these tracts of land and none of them were leased.

It is a familiar rule of this Court that moot questions are not decided and that advisory opinions are not given in cases where no actual legal controversy exists.

The rule laid down by this Court for its own guidance in the case of California v. San Pablo and Tulare Railroad Company, 149 U.S. 308, is directly in point here:

> "* * * The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or or property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propo-

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sitions, or to declare, for the governing of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

If a mere opinion upon a point of law was all that was desired by the petitioner in this action, a declaratory judgment could have been requested from the courts of the State of Montana. This was quite obviously not the case. The original petitioner desired to prevent a sale which he believed would be made upon unlawful terms—that sale was never held. None of the leases to be offered at that sale were ever offered. By consent of both parties to the contemplated leases, the applicants and the State of Montana, these applications have been cancelled.

It is, we think, significant that no steps were taken by the petitioner for certiorari in this case to keep the injunction issued by the State District Court in effect during the pendency of this petition. The reason is obvious—there was at the date of this petition nothing to which an injunction could any longer attach.

We submit that this action has been terminated and that any decision made by this Court could have no force and effect in this action. It could not reinstate an injunction which was allowed to lapse and which could not in any

event attach to anything. It can have no effect upon a lease sale which was long ago cancelled by consent of all concerned.

II. THE LAW INVOLVED IN THIS ACTION IS A STATE AND NOT A FEDERAL STATUTE

The status of the Montana Enabling Act has been construed by the Montana Supreme Court and by this Court on several occasions in the past. Its legal effect is well known: it is a compact between two sovereign governments which may be changed only by mutual consent of the parties. A mere action of Congress changing the terms of the Enabling Act is a nullity unless accepted by the State of Montana. Similarly, any attempted change by the State of Montana would be of no effect unless authorized by the Congress of the United States. The most recent change in the Enabling Act (Public Law 480, 80th Congress, 62 Stat. 170) was a nullity and of no force and effect in the State of Montana until accepted by the State of Montana. *It is the Montana legislation and not the Federal Act which must be looked to in determining what the Enabling Act means in the State of Montana.*

A proposed change in the Enabling Act by Congress extends an option to any state or states touched by the Enabling Act to change those restrictions within their boundaries. The suggested change need not be accepted at all; it could be partially accepted and only a certain

portion of the proposed change made effective in the particular state. We submit that the Act which accepted the offer extended by Public Law 480 of the 80th Congress is the operative law in this case. (There has even been some doubt raised by one member of our Supreme Court whether the method used in adopting this change was Constitutional under the Constitution of Montana). The Montana Act, Chapter 18, Laws of 1949, merely recited that the change was accepted and recited the full text of the Congressional legislation. We submit that by this procedure the statute became the law of Montana subject to the construction and the rules of construction obtaining in the State of Montana; and it is this Act and not the preceding Federal Act, which admittedly did not effect Montana upon its passage, that must be construed in this case.

III. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MONTANA SUPREME COURT AND ANY DECISION IN ANOTHER STATE BOUND BY THE SAME ENABLING ACT

It is contended at page 17 of the Petition filed in this case, that the Supreme Court of the State of North Dakota came to a conclusion diametrically opposed to that of the Montana court in the case of State ex rel. Rausch v. Amerada Petroleum Corp., 78 N.D. 247, 49 N.W. (2d) 14 (1951). At page 18, the petitioner quotes the portions of the Rausch decision upon which he relies to sustain his contention. There is no mention in either of these quotations of a contest over the term of the leases and, indeed,

there could not be any. No such argument was made in the Rausch case, and the Court neither decided it nor was asked to decide it.

The Rausch case concerned two arguments familiar in the land-grant states; whether, under the usual terms of enabling acts, the state received the minerals in the granted lands and whether the states were permitted to lease the lands or the minerals. These were points of great difficulty and gave rise to much litigation in the western states in years gone by. The point was so troublesome, in fact, that most, if not all, of the enabling acts have been changed to spell out, specifically, the right of the states to ownership of the minerals in granted lands and the rights of the states to lease their lands.

All that the Rausch case said, and all that it can be construed as saying, was that Congress had settled these questions by changing the Enabling Act. There was no contention by any party in that case that any specific terms were allowed by the Enabling Act change. The decision could not possibly be in conflict with the holding of the Montana Supreme Court and the most cursory reading of the Rausch case will show it.

The Rausch case was discussed by all the attorneys in this action when the case was pending in the Montana courts. It was generally conceded to have no application. The purpose in raising it here is evidently to try to show

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something akin to the familiar "conflicts in the circuits" rule which is often used to justify certiorari from this Court to the lower courts in the Federal system. The argument is extremely tenuous—one glance at the Rausch case will destroy it.

We submit that the conflict of decisions referred to in the petition is non-existent.

IV. POSITION OF THE LAND BOARD

It is the understanding of the majority of the State Land Board of Land Commissioners that a separate brief is being filed in this proceeding by Governor J. Hugo Aronson. Governor Aronson in this instance is acting in a purely individual capacity, and does not represent the State Board of Land Commissioners, or the State of Montana. Article XI, Section 4 of the Constitution of Montana places in the State Board of Land Commissioners the "direction, control, leasing, and sale of the school lands of the state." The members of the Board are the Governor, Secretary of State, Attorney General, and Superintendent of Public Instruction.

It was the judgment of three of the four members of this Board that they could not comply with the mandate of Chapter 122 of the Laws of 1953 without violating their constitutional duties as custodians of the school lands. The Governor opposed their determination. Throughout this action, the Governor has opposed the majority of the Board

and has, in spite of his position as a Board member and a defendant, joined the petitioner and opposed the majority decision.

We wish it to be clear to this Court that the Governor, in this instance, speaks neither for the Board nor for the State, and his desires are not those of the State Board of Land Commissioners. If, as expected, the Governor again joins the opposition at this stage of the proceeding, the majority of the State Board of Land Commissioners declines to be bound by his act. If the Governor concurs with the petitioner in requesting this Court to take jurisdiction, it does not, in any way, alter the opposition of the State Board of Land Commissioners to the exercise of this Court's jurisdiction.

The state law which is involved in this proceeding, Chapter 122, Laws of 1953, has had a long and stormy history in Montana. Some aspect of it has been considered at every legislative session for approximately forty years. Most legislative sessions have refused to entertain it. Twice before, when passed by both houses of the legislature, it was vetoed by a Governor. In 1953, forty years of pressure from the oil industry had so eroded our state system of constitutional safeguards that an indefinite lease of state lands was finally enacted into law.

The State of Montana has given better protection to its granted lands than any other state in the Union. The vigilance of successive Boards of Land Commissioners has preserved almost intact the heritage of our public schools.

The 1953 Act was the first serious interference by a legislature with the management of the land grant. It was the first interference committed at the request of an industry anxious, at the expense of the schools, to profit. The majority of the State Board of Land Commissioners feel that the 1953 Act is a land grab, purely and simply. It poses a question that can be answered only at the state level. This Court is being asked to interfere in a vital issue of state government; to use its power to interfere in an action which is already moot, at the instance of a party who is only a nominal plaintiff and who did not even enter the action until well after it had been begun by someone else. The Court is being requested to step in and rescue, at the last extremity, a land grab that failed.

There is a certain irony in the fact that the power of the United States, which set up the original grant with strict instructions for its preservation, is now being invoked in an attempt to tell the State of Montana that it has guarded its land grant too well, and that it must now relax its safeguards so the school lands can be made a source of private profit.

It is respectfully submitted that the Court should refuse the petition for certiorari.

ARNOLD H. OLSEN,
Attorney General of the State of Montana,
Helena, Montana

WILLIAM F. CROWLEY,
Assistant Attorney General,
Attorneys for Respondents.

AFFIDAVIT

STATE OF MONTANA)
ss:
COUNTY OF LEWIS & CLARK)

ARNOLD H. OLSEN, being first duly sworn, on oath, deposes and says:

That he is the Attorney General of the State of Montana.

That after the Brief to which this is attached had been printed, it was discovered that certain statements of fact contained therein were incorrect.

That the arguments and conclusions of the Brief are not affected by the inaccuracies, that your affiant desires that the facts presented to the Court be entirely accurate.

That it is stated in the printed Brief at page 4 that all of the applications for leases which were to be offered at public auction on April 29, 1953, were withdrawn during the pendency of this action. Investigation has shown this to be incorrect, as is more fully stated in the Affidavit of Iva Janet Smith which is attached hereto.

That the correct facts are these: Seventy-one of the seventy-six applications were withdrawn as stated. Five applications were not withdrawn and the tracts of land thus applied for were offered for lease and sold at public auction on January 18, 1955.

That your affiant believes that the facts herein stated do not change, but rather add weight to the conclusions stated in the Brief that this case has been completely disposed of and that the questions presented

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for decision to this Court are moot.

ARNOLD H. OLSEN
Attorney General of Montana

Subscribed and sworn to before me this 24th day of February, 1955.

Notary Public for the State of Montana; Residing in Helena, Montana; My Commission Expires January 19, 1958.

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AFFIDAVIT

STATE OF MONTANA)
: ss.
COUNTY OF LEWIS AND CLARK)

EVA JANET SMITH, being first duly sworn, on oath, deposes and says:

That she is the mineral leasing clerk of the State Land Department of the State of Montana.

That she receives all applications for leases, lists them, and notifies the Commissioner of State Lands and Investments and the State Board of Land Commissioners that applications have been received. When the State Board of Land Commissioners sets a date for sale of leases on state lands, she arranges for public advertising and lists the leases which will be offered. After public competitive bidding for the leases and acceptance or rejection of the highest bid for each tract by the State Board of Land Commissioners, she prepares lease forms for issuance to the successful bidders. She then enters the leases in the official records.

It is also her duty, when applications for leases are withdrawn, to remove the tract of land from the list of lands to be advertised and offered for lease; when applications are withdrawn, it is also one of her duties to refund the deposit of money which must accompany each application for lease.

That leases had been applied for on 76 tracts of state land prior to April 29, 1953, and that these 76 tracts were scheduled to be offered for lease by competitive public bidding on that date.

That the scheduled public sale of leases on these 76 tracts on April 29, 1953, was enjoined by order of

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the District Court of Lewis and Clark County, State of Montana, and said sale was never held then or thereafter.

That the applications which had been received for leases upon 71 of these 76 tracts were withdrawn individually and at various times by the applicants during a period of approximately 16½ months after the institution of the action for the injunction.

That in the regular course of business, your affiant returned the deposits of money and cancelled the applications where requested. That she took the usual steps to indicate on the records of the State Land Department that there was no application for lease of the tract concerned.

That the first withdrawal of an application for one of the 71 leases scheduled to be sold on April 29, 1953, was on May 16, 1953, and the last on October 1, 1954.

That no new application for a lease on any of these 71 tracts has been received in the State Land Office since the withdrawal of the applications which were on file on April 29, 1953.

That five of the 76 applications were not withdrawn. On January 18, 1955, these 5 tracts of land were put up for public bidding and leases upon them were sold to the highest bidder, as described below.

That on January 18, 1955, after the decision of the Montana Supreme Court in the case of Willis B. Jones vs. State Board of Land Commissioners, and before the institution of the petition to this court for a writ of certiorari by Ford Johnson, there was a public sale of leases upon state lands, at which sale all leases for which applications were then on file were put up for public competitive bidding.

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That none of the 71 tracts upon which applications for leases were withdrawn on or before October 1, 1954, were applied for, offered or leased at the sale on January 18, 1955.

Eva Janet Smith

Subscribed and sworn to before me this 25th day of February, 1955.

Chas. E. Leaphart

Notary Public for the State of Mont.
Residing at Helena, Montana
My Commission Expires January 19, 1956

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FILED
FEB 21 1955
HAROLD B. WILLEY, Clerk

No. 567

Supreme Court of the United States

OCTOBER TERM, 1954

STATE OF MONTANA, ex rel. FORD JOHNSON,

Petitioner,

vs.

THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, as Governing Board of the Department of State Lands and Investments; J. HUGO ARONSON, Governor of the State of Montana, President of said Board; MARY M. CONDON, Superintendent of Public Instruction of the State of Montana; SAM W. MITCHELL, Secretary of State of the State of Montana; ARNOLD H. OLSEN, Attorney General of the State of Montana, as members of said Board, and LOU W. BRETZKE, Commissioner of State Lands and Investments,

Respondents.

Separate Brief on Behalf of Respondent J. Hugo Aronson, Governor of the State of Montana

SAM C. FORD,
Power Block,
Helena, Montana,

RUSSELL E. SMITH,
First National Bank Bldg.,
Missoula, Montana,

HOWARD A. JOHNSON,
First National Bank Bldg.,
Butte, Montana,

Attorneys for J. Hugo Aronson, Governor of Montana.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 567

STATE OF MONTANA, ex rel. FORD JOHNSON,

Petitioner,

vs.

THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, as Governing Board of the Department of State Lands and Investments; J. HUGO ARONSON, Governor of the State of Montana, President of said Board; MARY M. CONDON, Superintendent of Public Instruction of the State of Montana; SAM W. MITCHELL, Secretary of State of the State of Montana; ARNOLD H. OLSEN, Attorney General of the State of Montana, as members of said Board, and LOU W. BRETZKE, Commissioner of State Lands and Investments,

Respondents.

Separate Brief on Behalf of Respondent J. Hugo Aronson, Governor of the State of Montana

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Respondent J. Hugo Aronson, Governor of Montana, respectfully submits this brief with respect to the Petition for Certiorari which has been filed in this case. This respondent fully concurs in the statements and arguments contained in the Petition, and further urges that irreparable loss will be incurred by petitioner and other taxpayers of the State of Montana—and by the public school system

of the State—if the question presented by this Petition is not specifically settled by this Court at the earliest possible time.

This Respondent, as Chairman of the State Board of Land Commissioners, voted to disregard the opinion of the Attorney General of Montana that Chapter 122 of the Laws of Montana, 1953, was invalid (Op. No. 13, Vol. 25) and accordingly voted to call for bids on oil and gas leases on school lands for a period of ten years and as long thereafter as oil or gas should be produced, as required by the 1953 law. When this suit was brought to enjoin the members of the State Board of Land Commissioners from calling for bids for leases in a form not authorized by the 1953 law, this Respondent secured separate counsel, and filed a separate Answer supporting the position of the relator and the intervenor who is the present petitioner. R. 49. The purpose of this brief is to call to this Court's attention certain additional matters that are believed to be important to its consideration of the Petition for Certiorari.

I

The State of Montana has three principal sources of revenue for the support of its public schools: (a) income from school lands granted to the State under the Federal Enabling Act; (b) local (county and school district) taxes levied on property; and (c) state appropriations. Particularly since the discovery in April 1951 of oil and gas in

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the Williston Basin (which extends generally over the eastern one-third of Montana and a substantial part of western North Dakota and South Dakota), revenues from oil and gase leases on school lands have assumed increasing importance in the support of the public school system.

In 1947, informed opinion in Montana recognized that maximum return on oil and gas leases on school lands could not be realized so long as such leases were limited by Federal law to a maximum term of 20 years. For this reason, the two houses of the State Legislature forwarded a Joint Memorial to the Congress of the United States (S. Joint Mem. 7, 80th Cong., 1st Sess., 93 Cong. Rec. 2426) reciting the fact and requesting that Section 11 of the Montana Enabling Act, which imposed this 20-year limitation, be liberalized. The Joint Memorial requested that Section 11 be amended to permit leases to be executed for "such periods of time and on such terms and conditions as may be, from time to time, provided by the Legislative Assembly of the State of Montana." As the Congressional history of the 1948 amendment to Section 11 unquestionably demonstrates (see Petition herein, pp. 9-13), Congress sought to comply with this request and to authorize the standard commercial form of lease for a stated term of years and as long thereafter as oil or gas should be pro? years and as long thereafter as oil or gas should be produced. The State of Montana promptly accepted this amendment by legislative enactment (Chapter 18, Montana Laws 1949). Although the language of Section 11, as amended, is permissive, the legislature indicated its judg-

ment on the value of leases with an "as long thereafter" clause by *requiring*, in Chapter 122, Laws of 1953, that all school land leases thereafter be made in that form.

II

The subsequent opinion of the Attorney General of Montana (accepted by a majority of the State Board of Land Commissioners) that the 1953 State statute was invalid because not permitted by Section 11 of the Enabling Act, as amended, promptly threw the State's whole school land oil and gas leasing program into confusion. The decision of the Montana Supreme Court, conflicting as it does with the interpretation of the same Enabling Act adopted by the Supreme Court of North Dakota two years before the 1953 Montana Law was enacted,[1] compounds that confusion. The State of Montana not only finds it impossible now to obtain the benefits of leases of the newly authorized and required type, but also, as a practical matter, finds it impossible to obtain full benefits from new leases on *any* terms. This is necessarily so because no prospective bidder can know whether the decision below is a correct interpretation of the basic Federal law, or whether the contrary interpretation of the same Enabling Act by the Supreme Court of North Dakota is correct.

III

The seriousness of this situation on income from oil and gas leases on school lands, and the substantial adverse effect on State taxpayers such as Petitioner, cannot be over-

[1] State ex rel. Rausch v. Amerada Petroleum Corp., 78 N. D. 247, 49 N. W. (2d) 14 (1951).

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emphasized. The following figures, taken from official State sources, tell the story:

Year Ending Dec. 31	Acreage of School Lands Under Oil or Gas Lease	Proceeds from Rentals, Bonuses and Penalties
1949	261,989.98	$ 257,195.58
1950	290,634.18	270,713.21
1951	349,608.64	857,645.56
1952	847,832.20	6,455,001.60
1953	636,702.67	479,531.25
1954	279,000.90	414,944.60

These figures have been compiled by the office of the State Commissioner of Lands and Investments. The same source has supplied the following detailed explanation of the drastic reduction which has taken place in the total proceeds from school lands in the past two years (omitting fractions of acres and dollars)

I	II	III	IV	V	VI	VII[2]
Year	Acreage Under Lease Jan. 1	New Lease Acreage	Cancellations	Acres Under Lease Dec. 31	Bonuses & 1st Year Rentals	Total Rentals Bonuses & Penalties (Inc. Col. VI)
1949	228,571	75,851	40,432	261,989	$ 166,079	$ 257,195
1950	261,989	81,082	52,437	290,634	132,987	270,713
1951[3]	290,634	137,234	78,260	349,608	677,538	857,645
1952	349,608	549,987	51,763	847,832	6,114,150	6,455,001
1953	847,832	none	211,129	636,702	none	479,531
1954	636,702	none	357,701	279,000[4]	none	414,944

As a result of the Attorney General's opinion that Chapter 122, Laws of 1953, was invalid, and this litigation that thereafter ensued, no oil and gas leases on school lands were executed during the calendar years 1953 and 1954. The expectation of the legislature was that the more commercially attractive leases authorized by the 1953 law would increase substantially the revenues from rentals and

[2] Royalties on oil and gas leases are regarded as capital and deposited in permanent school fund and not distributed as income as are rentals, bonuses and penalties.

[3] Discovery of oil in Williston Basin, April 1951.

[4] January 26, 1955.

bonuses; instead, they declined from $6,455,001 in 1952 to $414,944 in 1954. During this same period there was extensive leasing in Montana of Federal, Indian, and privately owned lands.

As an inevitable consequence, the payments to Montana school district from the income and interest on state school lands (including the income from oil and gas leases) also dropped very drastically—from $8,291,403 in 1953 to $4,379,124 in 1954—a reduction of $3,912,279.[5] The payments to school districts in Lewis and Clark County, where petitioner is a taxpayer, dropped from $310,613 in 1953 to $161,903 in 1954. This loss in payments to the school districts represents over 11 percent of the total operating expenses of Montana public schools in 1954, i.e., $34,858,000. Instead of permitting taxes for the support of schools to be reduced, the reduction has resulted in an increase in the tax levies of counties and school districts to offset the decline in revenue from the State school lands.[6]

No one can now state how much of the reduction in revenues in 1953 and 1954 has been due to the adverse opinion of the Attorney General and this litigation, and how much to the inability of the State to take advantage of the more favorable leasing terms made available by the

[5] Biennial Report, State Superintendent of Public Instruction, 1952-1954 (Helena, Montana) p. 74.

[6] As pointed out in the Petition for Certiorari (p. 6, n. 2), both the legislature and the county commissioners of each county are required by law to levy property taxes sufficient, when added to the revenues received from state school lands, to complete the school budgets determined according to the procedure spelled out in the statute. Mont. Rev. Code, Secs. 84-3810, 75-1704, 75-1722-3, 75-3610, 75-3706, 75-4508, 75-4516.

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1948 amendment to the Enabling Act. The injunction against the State Board of Land Commissioners issued by the District Court of course precluded leases under the pre-1953 Montana law, and the acceptance by the majority of that Board of the Attorney General's opinion that the 1953 law was unconstitutional made it impossible to seek bids for leases under the 1953 act.

Events since the decision below, however, make it apparent that not all of the State's losses can be attributed to the litigation, and that the State will lose very substantial revenues from its school lands if it cannot take advantage of the greater commercial attraction of leases in conformity with the 1953 act—and in conformity with the leases of Federal and Indian lands, and in conformity with the leases now in use in other land-grant States. When the Attorney General's opinion was issued in March 1953, applications were pending for leases under the 1953 act of 73 tracts of school land totaling 37,561 acres. After the decision of the Montana Supreme Court, the State Board of Land Commissioners, by a majority vote, called for bids on January 18, 1955, in accordance with the pre-1953 Montana law. At the sale held on that date bids were received on only 27 tracts, covering 11,876 acres.[7]

[7] Moreover, the amounts which the State of Montana can realize even from leases in the pre-1953 form have been drastically reduced. The total of amounts of first year rentals and bonuses at the January 18, 1955, sale was $30,160.86. That figure represented a price per acre of only $2.54, compared with an average price per acre of $11.83 for all leases between July 1951 (first leasing after Willison Basin discovery) and December 1952 (last leasing before litigation). The reduction is undoubtedly a reflection of the uncertainty of prospective lessees as to the validity of any lease which the State may now offer—an uncertainty which can be removed only by an authoritative construction of Section 11.

CONCLUSION

The question presented by the Petition for Certiorari *is* a simple one of statutory interpretation. The Petition shows that the intent of Congress appears to have been unmistakably to authorize the very form of leases which the court below has held invalid under the Enabling Act. The importance of the question to the citizens and taxpayers of Montana, and in truth to the people of all four States can hardly be questioned.

Moreover, there is urgent need for a prompt resolution of the question. On February 4, 1955, the Senate of the Montana legislature adopted, by unanimous vote, a resolution calling on the State Board of Land Commissioners "to use its best efforts" to obtain a speedy decision from this Court.[8] The State and its taxpayers will continue to suffer until the construction of Section 11 is authoritatively resolved—which can be done only by this Court.

Under this unusual combination of circumstances, it is respectfully urged that not only should the Petition for Certiorari be granted, but that the j u d g m e n t should be reversed without further argument and the cause remanded to the Supreme Court of Montana with instructions to proceed not inconsistently with the concise and plaintly correct

[8] The text of the Resolution states:

Be Is Resolved by the Senate of the Thirty-Fourth Legislative Assembly of the State of Montana:

Whereas, a petition has been filed in the Supreme Court of the United States in the case of State ex rel Jones vs. State Board of Land Commissioners et al, by which petition a review is requested of the decision issued by the Supreme Court of Montana which held that oil and gas leases of state school lands provided for by Chapter 122, Laws of Montana, 1953, would violate the

interpretation of Section 11 of the Enabling Act, as amended, which is set forth in the judgment of the Montana District Court for Lewis and Clark County (R. 74; Appendix to Petition for Certiorari, pp. 28-31). If the Court believes that it should hear oral argument on the question before issuing its decision, it is further respectfully urged that the Court advance the case on its docket so that it may be heard before the Court adjourns.

Respectfully submitted,

SAM C. FORD,
Power Block,
Helena, Montana,

RUSSELL E. SMITH,
First National Bank Bldg.,
Missoula, Montana,

HOWARD A. JOHNSON,
First National Bank Bldg.,
Butte, Montana,

Attorneys for J. Hugo Aronson, Governor of Montana.

Enabling Act of the states of Montana, North Dakota, South Dakota, and Washington, as said act was amended by Congress in 1948 at the request of the Thirtieth Legislative Assembly of the State of Montana, and

Whereas, since April of the year 1953, said case has been pending in the courts and no oil and gas leases have been made by the State of Montana, with the result that anticipated revenues from state oil and gas leases have not been available for distribution to the public schools, and

Whereas, subscribing to the principle that the orderly and historic processes of American government provide that every litigant be permitted to appeal to the highest court in the land having jurisdiction of his case, we conceive that in right and justice this appeal is entitled to be promptly presented to the Supreme Court of the United States, and

Whereas, the decision of the Montana Supreme Court in said case conflicts with the construction of the aforesaid Enabling Act by the Supreme Court of North Dakota, resulting in confusion, hampering the oil and gas development of state lands in Montana; and it is thus important to the people of Montana

that the said Enabling Act have a uniform construction and operation in the states of Montana, North Dakota, South Dakota, and Washington, and

Whereas, the great Williston Basin, which is the scene of intensive activity in oil and gas exploration and development, comprises large areas of land in Montana, North Dakota, and South Dakota, and it is important that oil and gas activity and development on state lands proceed without uncertainty as to the validity of such leases, and

Whereas, it is therefore urgently necessary for the welfare of Montana that the appeal of the aforesaid decision of the Montana Supreme Court be submitted to the United States Supreme Court at the earliest possible date, so that the question presented by such appeal may be finally decided during the current session of the Legislative Assembly of Montana, if possible.

Now, Therefore, Be It Resolved, that the State Board of Land Commissioners, Arnold H. Olsen, as Attorney General of the State of Montana and as attorney for said State Board of Land Commissioners, and J. Hugo Aronson, Governor of the State of Montana, each and all of them, be, and they hereby are, urged and requested, in the best interests of the State of Montana, to promptly file their respective appearances before said United States Supreme Court and to prosecute said appeal without delay; and they are further urged and requested to use their best efforts and influence to persuade said court promptly to hear and adjudicate said appeal, to the end that the clouds and suspicions with which oil and gas leases are now burdened may be dispelled and so that money again may flow into the school funds as they properly should do.

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No. 567

Supreme Court of the United States

OCTOBER TERM, 1954

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Petitioner,

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Repondents.

BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE

PHIL W. SAUNDERS,
Attorney General of
the State of South Dakota
State Capitol
Pierre, South Dakota

Ralph A. Dunham
Clark, S. D.

Supreme Court of the United States

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Repondents.

BRIEF OF THE STATE OF SOUTH DAKOTA AS AMICUS CURIAE

In accordance with Rule 42 (4) the State of South Dakota, by its Attorney General, Phil W. Saunders, respectfully submits this brief as *amicus curiae* in support of the Petition for Writ of Certiorari in the above entitled case.

I.

In addition to the State of Montana, the States of Washington, North Dakota and South Dakota were admitted as states of the United States pursuant to the Enabling Act known as the Act of February 22, 1889 (25 Stat. 676), and have an equal interest with the State of Montana in the interpretation of said Enabling Act and the amendments thereto. Thus, the question presented on appeal of the above action of the interpretation and construction of the 1948 Amendment to Section 11 of said Enabling Act, known as Public Law 480 of the Eightieth Congress (62 Stat. 170), is of vital concern to the State of South Dakota. The pertinent part of the 1948 Amendment reads:

> "Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective states; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years."

II.

The current South Dakota oil and gas leases involving school and public lands granted the State of South Dakota by said Enabling Act are made pursuant to the authority of the South Dakota Legislature as contained in S.D.C. Supp. 15.0510, which provides for a term not to exceed ten years and as long thereafter as oil or gas is produced from the leased lands. Said South Dakota leases contain the following duration clause:

"It is agreed that this lease *shall remain in force for a*

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term of ten years from this date, and as long thereafter as oil, gas, casinghead gasoline or any of them is produced from said leased premises, or drilling operations are continued as hereinafter provided."

The above italics clearly reflects the conflict which exists between the majority opinion of the Montana Supreme Court in the above entitled matter and the position of the State of South Dakota.

III.

The said decision of the Supreme Court of the State of Montana has a maximum effect, as precedent, of raising a question with respect to the validity of oil and gas leases presently in force upon South Dakota Enabling Act lands, and a minimum effect of detracting substantially from the revenues which the State of South Dakota may, in future leasing, expect to derive from the leasing of such lands in that the said decision introduces uncertainty which may reflect adversely upon the value of South Dakota lease offerings of such lands.

IV.

Unlike the situation in the State of Montana, where the issue went into litigation before a single lease of such duration was ever issued, the situation in the State of South Dakota is of even more serious consequence in that the State of South Dakota now has under outstanding leases containing such a duration clause approximately three million acres of Enabling Act lands, and from these leases the State of South Dakota has to date derived revenues of approximately five million dollars. Moreover, there is now some oil being produced under certain of these leases, and there are therefore substantial interests which have been vested by production under such leases.

V.

Though argument on the merits in this litigation will be properly in order when and if this Honorable Court grants certiorari, it is here pointed out that a lease having a duration measured by production is nevertheless, within the framework of the congressional purpose in enacting said 1948 amendment, a lease for a term of years, which term of years is indefinite. This is true because, to put the matter briefly, oil and gas are wasting resources which, to keep a producing lease in force, must be regularly produced by the lessee after discovery to the full economic extent feasible in order that the covenants and obligations of his lease be met and the lease thereby kept in force. When commercial production is exhausted, the lease is at end. In the case of usual producing properties, this term of years is relatively short, and in all cases a future time of lease termination is always a certain prospect. Reference to the congressional committee reports preceding the amendment here in issue make it abundantly clear that the Congress intended just such an indefinite term of years. The Enabling Act should be interpreted in conformity with this congressional intent, for the wording of the amendment is susceptible of such an interpretation, which interpretation would be in conformity with the plain congressional purpose.

CONCLUSION

The State of South Dakota believes that the decision of the Supreme Court of Montana sought to be reviewed here is erroneous. For the reasons set forth in the Petition

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for Writ of Certiorari as well as in this Brief, the State of South Dakota accordingly urges that the petition be granted, and that the judgment of the Supreme Court of Montana be reversed.

Respectfully submitted,

PHIL W. SAUNDERS,
Attorney General of the State of South Dakota

State Capitol
Pierre, South Dakota

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In the Supreme Court of the United States

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Respondents.

BRIEF OF THE STATE OF NORTH DAKOTA AS AMICUS CURIAE

LESLIE R. BURGUM,
Attorney General of the
State of North Dakota.

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Respondents.

BRIEF OF THE STATE OF NORTH DAKOTA AS AMICUS CURIAE

The State of North Dakota, by its Attorney General, respectfully submits this brief as *amicus curiae* in support of the petition for writ of certiorari in the above-entitled case. Rule 42(4). The issues raised by the petition are of substantial concern to the State of North

Dakota, and it is of major importance to that State that the decision of the Supreme Court of Montana be reviewed, and reversed.

* * * * * *

North Dakota was admitted to the Union pursuant to the same Enabling Act which was applicable to South Dakota, Washington and Montana. Act of February 22, 1889, C. 180, 25 Stat. 676. That Act granted to each of those four states certain lands in trust for support of the public schools, and, in Section 11, specified conditions equally applicable to each of the four States governing the sale and lease of such lands. As amended by the Act of April 13, 1948, C. 183, 62 Stat. 170, this Section now provides that oil and gas leases on such lands "shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective states."

The Board of University and School Lands, pursuant to statutory authority,[1] has executed many oil and gas leases on these lands so granted by the 1889 Act. The leases have been similar to that summarized in a recent opinion of the North Dakota Supreme Court:

> "The lease in question gives to the lessee the right to explore and exploit the oil and gas resources underlying the land described therein for a term of five years, and as long thereafter as oil or gas or either of them is produced from the land by the lessee."[2]

The validity of leases containing what is generally known as an "habendum clause" of this type, under Sec-

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1 **N. D. Rev. Code, 1943,** Sec. 15-0509, as amended by **N. D. Laws 1951, C. 232,** Sec. 5, and **N. D. Laws, 1953, C. 337.**

2 **State ex rel. Rausch v. Amerada Petroleum Corp.,** 78 N. D. 247, 49 N. W. 2d 14, 17 (1951).

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tion 11 of the Enabling Act (and under the Constitution of North Dakota), was raised in this State in *State ex rel. Rausch v. Amerada Petroleum Corp.*, 78 N. D. 247, 49 N. W. 2d 14 (1951). That case challenged a lease of the type summarized above as invalid because the legislative enactments which authorized its execution were "in conflict with and contrary to the provisions of the Enabling Act and the Constitution of North Dakota, specifically Section 11 of the Enabling Act * * *" 49 N. W. 2d at p. 17. The Supreme Court of North Dakota upheld the state legislation and the lease executed under it. The court pointed out that, regardless of whether such leases could have been authorized prior to the 1948 amendment to Section 11 of the Enabling Act (49 N. W. 2d at p. 19):

> "Congress has removed all doubt as to the right of a state to enter into leases for the production of minerals, including leases for the exploration for oil and gas, by amending the Enabling Act. The Legislature of North Dakota, insofar as the Enabling Act and its amendments are concerned, had full power to provide for the execution of oil and gas leases."

The *Amerada Petroleum Corp.* decision involved a lease dated November 10, 1948, which had been executed under the broad permissive provisions of Section 15-0509, N. D. Rev. Code 1943.[3] The financial advantage to the State of executing leases containing habendum clauses in accordance with the usual business practice was so great, however, that this was made mandatory in 1951. Chapter 232 of the N. D. Laws, 1951, Section 5, provided:

---

[3] "The board of university and school lands may lease any lands under its control believed to contain oil, gas, coal, cement materials, sodium sulfate, sand and gravel, road material, building stone, chemical substances, metallic ores, or colloidal or other clays, and may make and establish rules and regulations for development and drilling operations."

> "All leases hereunder shall be made for a period of not less than five years and shall continue in effect under the terms thereof as long as oil or gas may be produced thereon in commercial quantities."[4]

The decision of the Supreme Court of Montana which is sought to be reviewed here is squarely in conflict with the *Amerada Petroleum Corp.* case on the interpretation of Section 11 of the Federal Enabling Act, as amended. The State of North Dakota now owns and holds 996,895.97 acres of land granted by the Enabling Act, of which a substantial portion lies in actual or probable oil or gas bearing areas. As noted above, the Board of University and School Lands has executed numerous oil and gas leases on these lands which contain the standard habendum clause. As of December 31, 1953, some 884,613.28 acres of school lands had been leased on such terms. In that year the total proceeds to the State Public School System from such leases amounted to $559,892.57 or 1.9 plus % of the total public school operating expenditures. As the table below shows, both the acreage of school lands so leased and the income therefrom has steadily increased in recent years, and it is anticipated that this increase will continue.

Year	Acreage of School Lands under Lease Containing Habendum Clause	Proceeds Received from such Leases
1949	448,203.44	$ 122,050.86
1950	552,860.56	$ 138,215.14
1951	672,570.08	$ 519,985.84
1952	837,999.00	$ 1,795,359.75
1953	884,613.28	$ 559,892.57
1954	793,309.72	$ 916,115.93

[4] These provisions were re-enacted in N. D. Laws, 1953, C. 337.

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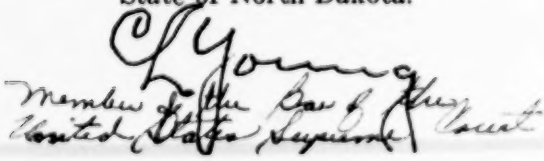
The decision of the Supreme Court of Montana necessarily raises a question in the minds of oil and gas leaseholders and prospective leaseholders on North Dakota school lands with respect to the correctness of the interpretation of the Enabling Act which was adopted by the Supreme Court of North Dakota; in effect, it casts a cloud on the title of outstanding oil and gas leases on some 793,309.72 acres of North Dakota school lands. Of even more importance, so long as this question remains unresolved by a definitive decision of this Court, prospective new lessees may be unwilling to purchase leases containing habendum clauses in accordance with North Dakota law, or may give effect to the present doubts as to validity by substantially lower bids on such leases. The importance of this adverse effect on the very substantial income which would otherwise be expected to be received in the future from oil and gas leases on North Dakota school lands cannot be overstated.

CONCLUSION

The State of North Dakota believes that the decision of its Supreme Court in the *Amerada Petroleum Corp.* case correctly interpreted Section 11 of the Enabling Act as amended, and that the decision of the Supreme Court of Montana sought to be reviewed here is erroneous. For the reasons set forth in the Petition for Writ of Certiorari as well as in this Brief, the State of North Dakota accordingly urges that the petition be granted, and that the judgment of the Supreme Court of Montana be reversed.

Respectfully submitted,

LESLIE R. BURGUM,
Attorney General of the
State of North Dakota.



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No. 567. MONTANA EX REL. JOHNSON *v.* STATE BOARD OF LAND COMMISSIONERS ET AL. On petition for writ of certiorari to the Supreme Court of Montana. *Per Curiam:* Certiorari is granted. The decision below is reversed insofar as it holds that the 1953 Montana Statute, Montana Rev. Codes, 1947 (Cum. Supp. 1953), § 81–1702 (2), is inconsistent with federal law. The case is accordingly remanded to the Montana Supreme Court for proceedings not inconsistent with this order. *William J. Jameson, Dean Acheson, Charles A. Horsky* and *W. Graham Claytor, Jr.* for petitioner. *Arnold H. Olsen*, Attorney General of Montana, and *William F. Crowley*, Assistant Attorney General, for respondents. *Russell E. Smith* for the Governor of Montana, respondent. Briefs of *amici curiae* in support of the petition were filed by

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Leslie R. Burgum, Attorney General, and *C. L. Young* for the State of North Dakota, and *Phil W. Saunders*, Attorney General, and *Ralph A. Dunham* for the State of South Dakota. Reported below: 128 Mont. —, 279 P. 2d 393.